90-224

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1990

JON F. BARNES, HOMER L. GIBSON, JEAN Z. GIPSON, CLARENCE P. KENNEDY, NORMAN J. MUTH, FEBO C. SPAGNUOLO,
Petitioners,

vs.

GENCORP INC.,
Respondent.

—0—

RICHARD S. NOVITSKY,
Petitioner,

vs.

DIVERSITECH GENERAL, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

RICHARD V. LEVIN
Counsel of Record
66 South Miller Road
Akron, Ohio 44333
(216) 836-5297
Attorney for Petitioners

Of Counsel:
LAURIE F. STARR
DAVID E. ROLOFF
GAINES & STERN
1700 Ohio Savings Plaza
Cleveland, Ohio 44114
(216) 781-1700

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

QUESTION PRESENTED FOR REVIEW

Whether, in an individual disparate-treatment case under the Age Discrimination in Employment Act, statistical evidence showing grossly disproportionate discharge rates in older (protected) age groups — such that it is held to constitute a stand-alone prima facie case — is sufficient to raise a genuine issue of material fact on the issue of pretext, thus precluding the granting of summary judgment against a member of such an age group.

PARTIES BELOW

The parties to the proceeding immediately below, in the United States Court of Appeals for the Sixth Circuit, included the seven petitioners (Jon F. Barnes, Homer L. Gibson, Jean Z. Gipson, Clarence P. Kennedy, Norman J. Muth, Richard S. Novitsky, and Febo C. Spagnuolo) and four other plaintiffs (Willy P. Kulhanek, Theophilos A. Millis, Milan A. Rolik, and Norman S. Trommer) as appellants and the two respondents (GenCorp Inc. and DiversiTech General, Inc.) as defendants-appellees.

STATEMENT PURSUANT TO RULE 29.1

This Petition has not been filed by or on behalf of a corporation.

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PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

Petitioners Jon F. Barnes, Homer L. Gibson, Jean Z. Gipson, Clarence P. Kennedy, Norman J. Muth, Richard S. Novitsky, and Febo C. Spagnuolo respectfully request that a writ of certiorari issue to review the February 22, 1990 judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, as amended April 30, 1990, affirming in part and reversing in part two judgments of the United States District Court for the Northern District of Ohio, is reported as *Barnes v. GenCorp Inc.* at 896 F.2d 1457 (6th Cir. 1990) and is reproduced in the Appendix to this Petition at page A1. The opinions of the district court, which were unreported, are reproduced at pages A44 and A70. The Court of Appeals' April 30, 1990 order denying rehearing and rehearing *en banc* is reproduced at page A94. The Court of Appeals' February 22, 1990 judgment, which petitioners seek to be reviewed, is reproduced at page A96. [The judgment was unaffected by the amendments to the February 22, 1990 opinion.]

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on February 22, 1990. A timely petition for rehearing and rehearing *en banc* was denied on April 30, 1990. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (1988).

APPLICABLE STATUTE

Section 4(a)(1) of the Age Discrimination in Employment Act provides:

(a) Employer practices. It shall be unlawful for an employer —

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; . . .

29 U.S.C. § 623(a)(1) (1967).

STATEMENT OF THE CASE

The seven petitioners and four other persons — each having 25 to 39 years of employment with respondent GenCorp Inc. ("GenCorp") or its subsidiary, respondent DiversiTech General, Inc. ("DiversiTech") — filed individual actions in the United States District Court for the Northern District of Ohio, challenging the legitimacy of their discharge by respondents during a 1987 workforce reduction. Each plaintiff alleged that his or her discharge was violative of the Age Discrimination in Employment Act ("ADEA") and Ohio discrimination law. The district court had jurisdiction over plaintiffs' claims by virtue of 28 U.S.C. § 1331 (1980). [Petitioners will limit their discussion in this Petition to their claims under the ADEA.]

The seven "GenCorp plaintiffs" presented expert statistical testimony, in the form of a report with full results attached, showing that a disproportionate number of older workers (over-age-48, over-52, and over-55), including those seven plaintiffs, were discharged from GenCorp's Research Division. The four "DiversiTech plaintiffs" presented a similar report with respect to workers, including those four plaintiffs, in the over-55 and over-60 age groups in

DiversiTech's Polymers Division. The statistical studies were based upon chi-square and binomial tests performed upon the respondents' undisputed discharge/retention data. The tests showed disparities between actual and expected (random) discharge rates exceeding three standard deviations at GenCorp, and in excess of four standard deviations at DiversiTech, for all older age groups studied.

The data in the expert's reports revealed, for example, that although persons over age 55 comprised only 19.6 percent of the workforce at GenCorp's Research Division, 42.1 percent of those discharged were in this age group. The overall discharge rate for the Research Division was 24.8 percent, but 53.3 percent of the over-55 group were discharged, compared with only 17.9 percent of those under 55. Similarly, persons over 60 comprised only 6.1 percent of the workforce at DiversiTech's Polymers Division, but sustained 53.8 percent of the discharges. Even more disproportionate was the comparison between workers over and under age 60, limited to those departments affected by the reductions, where 87.5 percent of those over 60 were discharged, compared with only 5.9 percent of those under 60.

The statistical expert calculated probabilities ranging from 99.6 to more than 99.995 percent that, under a hypothesis of age-neutrality, the gross disparities observed in each older age group studied would not have occurred. Based upon the calculations, he concluded that, "to a virtual statistical certainty, age was a determining factor in the termination of the

employees in each of the indicated groupings." *Barnes*, 896 F.2d, at 1463; App. A10.

In granting summary judgment against the 11 plaintiffs in two separate rulings, the district court rejected all of plaintiffs' evidence, statistical and non-statistical, and held that none of the plaintiffs had established a prima facie case or demonstrated pretext. [In announcing the results of its *de novo* review of the summary judgments, the appellate court made no reference to the reasoning of the district court.]

In a consolidated appeal, the United States Court of Appeals for the Sixth Circuit upheld the probative value of plaintiffs' statistical evidence and held that it constituted a stand-alone prima facie case of age discrimination against each respondent. *Id.* at 1466-68; App. A16-22. The court further held, however, that the statistical evidence was insufficient to raise a jury question on the issue of pretext in the face of respondents' allegations that others were better qualified for retention than the plaintiffs. *Id.* at 1468-69; App. A22-25.

The Court of Appeals went on to hold that three plaintiffs had presented jury questions on the issue of their comparative qualifications; that one additional plaintiff had presented a jury question in regard to a series of unfavorable employment actions taken against him during the three-year period preceding his discharge; and that the other seven plaintiffs (the petitioners) had not presented jury questions on the issue of pretext. Accordingly, the Court of Appeals reversed four cases and remanded them to the district court for trial, while affirming

the grant of summary judgment against the petitioners. *Id.* at 1470-76; App. A27-43.

The petitioners' statistical evidence was first upheld — indeed staunchly defended — by the appellate panel at the prima-facie stage of analysis and then abruptly cut adrift in the pretext phase. In so doing, the court disclaimed a willingness to hold that statistics could never form the basis for rebuttal by the plaintiff. *Id.* at 1468; App. A23. The only example cited approvingly by the court, however, involved rebuttal of other statistical evidence, not rebuttal of the defendant's explanation for discharge. The court thus seemed to leave no room for statistics as a means of surviving summary judgment or a directed verdict.

The court went on to state that "we do not believe that the statistics presented in this case provide an adequate response to the defendants' explanations." *Id.* Yet the court had found the same statistics to be sufficiently probative, standing alone, to constitute a prima facie case. The court offered no explanation of why those statistics were inadequate to show pretext, except to say that the particular type of rebuttal offered by the defendants (based on comparative qualifications) had "undercut the importance of the plaintiffs' statistical proof" and thus "cannot be rebutted by reference to the statistics already presented since the statistics here do not tend to establish that age played a factor in any *particular* decision." *Id.* at 1469; App. A25 (emphasis in original).

Unexplained by the court was the question of how a few allegations of inferior (but not inadequate) qualifications, unsupported by a statistical analysis,

could undercut statistical studies based on many dozens of employees and showing disparities of three and even four standard deviations — especially at the summary judgment stage, when mere issues of fact, not definitive conclusions, are to be identified. Moreover, the court gave no hint of anything in those *particular* statistics that rendered them unsuitable to show that age played a factor in a particular decision. Finally, the court offered no reason why an employer's explanation based on comparative qualifications should be any more immune from (indirect) statistical contradiction than any other type of explanation.

The court's conclusion that the plaintiffs' statistics were inadequate to show pretext was purportedly based on the particular statistics and rebuttal presented. But given the court's emphatic endorsement of the same statistics in its prima-facie analysis, its decision apparently stemmed from the notion — unsupported by the citation of any precedent — that statistical evidence is *never* sufficient to show pretext, regardless of the composition and persuasive power of the statistics. In its entire discussion of pretext, the court cited only one case, *Palmer v. Shultz*, 815 F.2d 84, 90-91 (D.C. Cir. 1987), but in *Palmer* the plaintiff's statistics were *accepted* and the district court's judgment for the defendant was reversed.

REASON FOR ALLOWANCE OF THE WRIT

This appeal squarely presents a substantial question under the ADEA which has been decided by the Sixth Circuit Court of Appeals in a way that conflicts with applicable decisions of this Court and of at least five other circuits.

This Court made it clear in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256, 101 S.Ct. 1089, 1095 (1981), that a disparate-treatment plaintiff may prove intentional discrimination "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." The use of statistical evidence to show pretext had earlier been approved by this Court in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 804-05, 93 S.Ct. 1817, 1825-26 (1973), in which it was stated that "statistics as to petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination."

The Sixth Circuit itself, citing *McDonnell Douglas* as precedent, has long recognized that a statistical analysis of termination levels within a particular age group can be used to show whether an individual member of that group has been discriminated against. *Laugesen v. Anaconda Company*, 510 F.2d 307, 317 (6th Cir. 1975). More recently, the Sixth Circuit has stated that plaintiffs typically "must rely on such circumstantial evidence as differential

treatment, inconsistent records *or statistical evidence of discrimination*" in performing their "difficult task in meeting their burden of persuasion in ADEA cases . . ." *Chappell v. GTE Products Corporation*, 803 F.2d 261, 266 (6th Cir. 1986) (emphasis added).

This Court has never adopted inflexible rules for assessing the probative value of statistics, but it has held that standard-deviation analysis is an acceptable methodology for distinguishing whether a statistical variance is so small as to be most likely attributable to chance, or so significant as to permit an inference of discrimination. This Court has also suggested that a variance of "two or three standard deviations" may be recognized as signifying a degree of statistical significance. *Hazelwood School District v. United States*, 433 U.S. 299, 309 n.14, 97 S.Ct. 2736, 2743 n.14 (1977), *citing Castaneda v. Partida*, 430 U.S. 482, 497 n.17, 97 S.Ct. 1272, 1281 n.17 (1977).

In hiring and promotion cases, however, there frequently arises the troublesome issue of whether the minimum qualifications of the position sought have been properly taken into account in the statistical study. Such questions can justifiably cast doubt upon the probative value of the plaintiff's statistics.

In contrast, as recognized in the opinion below, reduction-in-force cases seldom present such problems, since "we can assume that all of the employees are qualified to perform their job since they were actually performing it at the time of their discharge." *Barnes*, 896 F.2d, at 1469 n.18; App. A24 n.18. The credibility of petitioners' statistical studies is also enhanced by the fact that they are based entirely on

undisputed discharge/retention data provided by the respondents. Unencumbered by disputes over minimum qualifications or the accuracy of the raw data, the gross disparities revealed by petitioners' statistics are all the more probative of intentional discrimination — and all the more capable of supporting a jury verdict for the petitioners. "A plaintiff . . . need not prove discrimination with scientific certainty; rather, his or her burden is to prove discrimination by a preponderance of the evidence." *Bazemore v. Friday*, 478 U.S. 385, 400, 106 S.Ct. 3000, 3009 (1986).

What puts the Court of Appeals' decision on a collision course with *McDonnell Douglas* is the court's conclusion that the plaintiffs' statistical evidence is inadequate to rebut the defendants' qualifications-based explanations "since the statistics here do not tend to establish that age played a factor in any *particular* decision." *Barnes*, 896 F.2d, at 1469; App. A25. Since the court clearly found no fault with those particular statistics (having held that they constituted a stand-alone prima facie case), the stated rationale for rejecting them at the pretext stage plainly disregards the clear implication of *McDonnell Douglas*: that group statistics are probative of discrimination (or the absence thereof) against an individual member of the group. That principle does not specify that the probative value of the statistics vanishes as soon as the defendant offers an explanation; *McDonnell Douglas* mandates the opposite conclusion.

It is true, of course, that statistics showing disproportionately high discharge levels within a protected group are *equally* probative of discrimin-

ation against *each* member of the group. If this characteristic were deemed a fatal flaw in any evidence of discrimination that might be presented in a disparate-treatment case, many well-recognized types of proof would be foreclosed — e.g., age-related statements not directed toward a particular person, adoption of discriminatory policies, and other non-statistical evidence of a history of discriminatory employment practices.

Similar problems arise with regard to the circuit court's apparent belief that statistics are an inadequate response to the defendants' particular rebuttal (that others were better qualified for retention). While such a rebuttal cannot be *directly* contradicted by statistics, the same may be said of *any* rebuttal that is specific to the plaintiff — e.g., poor reputation, poor attitude, or unpleasant personality.

In short, the court's rationale — if followed consistently at the pretext phase of all disparate-treatment cases — would mandate the rejection (or at least the insufficiency) of *all* plaintiff's evidence not *uniquely* applicable to the plaintiff, or, at a minimum, would preclude the plaintiff's use of statistics to overcome *any* proffered explanation uniquely applicable to the plaintiff.

The court's undue emphasis on the comparative-qualifications defense also brings its decision into conflict with *Patterson v. McLean Credit Union*, ___ U.S. ___, 109 S.Ct. 2363, 2378-79, 2394 (1989). In *Patterson*, this Court unanimously reversed the district and circuit courts for an erroneous jury instruction requiring the plaintiff to directly disprove the employer's explanation for not promoting him

(that another employee was better qualified). In making it clear that the plaintiff must be given wide latitude in proving pretext, this Court stated:

> The evidence which petitioner can present . . . to establish that respondent's stated reasons are pretextual may take a variety of forms. See *McDonnell Douglas, supra*, 411 U.S., at 804-05, 93 S.Ct., at 1825-26. [Other citation omitted.] Indeed, she might seek to demonstrate that respondent's claim to have promoted a better-qualified applicant was pretextual by showing that she was in fact better qualified . . . for that position. The District Court erred, however, in instructing the jury that . . . petitioner was *required* to make such a showing. . . . She may not be forced to pursue any particular means of demonstrating that respondent's stated reasons are pretextual.

Id. at 2378-79 (emphasis in original). No less emphatic on the need for flexibility at the pretext stage was the concurring opinion of Justice Brennan (speaking for the four Justices who had not joined in the Opinion of the Court):

> Such an instruction is much too restrictive, cutting off other methods of proving pretext plainly recognized in our cases. We suggested in *McDonnell Douglas*, for example, that a black plaintiff might be able to prove pretext . . . by proving *the employer's "general policy and practice with respect to minority employment."* 411 U.S., at 804-05, 93 S.Ct., at 1825-26.

Id. at 2394 (Brennan, J., concurring and dissenting; emphasis added).

Significantly, both of the above passages from *Patterson* cited the specific portion of *McDonnell Douglas* which approved the use of employment statistics to show pretext: a strong reaffirmation by this Court.

Given the absence of any criticism of plaintiffs' statistics, the circuit court's rejection of their use to show pretext strongly implies that the court would not have approved the use of *any* statistics for that purpose, *McDonnell Douglas* notwithstanding. But assuming instead that the court's expressed rationale — that the *particular* defense chosen cannot be rebutted by statistics — was its only reason for ruling as it did, that would imply that, had the respondents chosen a different defense, the plaintiffs might not have been required to present evidence of pretext beyond their statistics.

The "special status" thus conferred upon a comparative-qualifications defense, forcing plaintiffs who had already made a statistical prima facie case to respond with qualifications evidence of their own, is precisely the approach unanimously rejected in *Patterson*. In taking such an approach, the circuit court flatly disobeyed this Court's emphatic reminder in *Patterson* of what it had prescribed in *McDonnell Douglas*: that the plaintiff must be given wide latitude in his choice of probative evidence to demonstrate pretext.

Strangely, the circuit court failed to discuss *McDonnell Douglas* or *Patterson* in dealing with the

question of pretext. In fact, as pointed out above in the Statement of the Case, the court cited *no cases at all* on pretext — pro or con — except for one circuit court opinion, *Palmer*, 815 F.2d, at 90-91, in which the plaintiff's statistics were *accepted* and the district court's judgment for the defendant was reversed.

At least five circuits — citing *McDonnell Douglas* as precedent for the use of statistics to show pretext — have taken the position that sufficiently probative statistical evidence can support a verdict in favor of a discrimination plaintiff.

The First Circuit, for example, deemed the testimony of a statistics expert to be "sufficient to show — arguably — that [the employer's] explanation was designed to mask age bias." *Freeman v. Package Machinery Company*, 865 F.2d 1331, 1342 (1st Cir. 1988).

The Second Circuit has stated that a showing of pretext "may be made either through direct evidence of subjective intent, or through statistical proof revealing a pattern of teacher assignments indicative of a discriminatory purpose." *Rodriguez v. Board of Education of Eastchester Union Free School District*, 620 F.2d 362, 367 (2d Cir. 1980).

The Fifth Circuit has held that "[i]f an employee establishes by statistics that an employer had a discriminatory practice or policy . . . , the court may infer that the employer's justification for an action it took against the plaintiff was merely pretext . . ." *Plemer v. Parsons-Gilbane*, 713 F.2d 1127, 1137 (5th Cir. 1983).

The Eighth Circuit, in holding that the plaintiff's statistical evidence was sufficient to support a finding

in his favor, stated that statistics are "a form of circumstantial evidence from which an inference of discriminatory animus may be drawn." *Easley v. Anheuser-Busch, Inc.*, 758 F.2d 251, 260 (8th Cir. 1985). In *Parham v. Southwestern Bell Telephone Company*, 433 F.2d 421, 426 (8th Cir. 1970), the same court had deemed statistical evidence to be sufficient in itself to establish discrimination, while commenting that in discrimination cases, "statistics often tell much and Courts listen."

Finally, the Tenth Circuit has held that "[t]hese unrefuted statistics are sufficient to support a jury's finding of pretext against [the employer]." *McAlester v. United Air Lines, Inc.*, 851 F.2d 1249, 1261 (10th Cir. 1988).

CONCLUSION

Even if the decision below were not in conflict with *McDonnell Douglas*, *Patterson*, and at least five federal courts of appeals, it would still be imperative that this Court grant review. If the decision is left intact, employers in the Sixth Circuit will be free, for example, to discharge the older half of their workforce while keeping all the rest — as long as they can concoct, for each discharge, a subjective reason that is difficult or impossible to directly refute. No matter how compelling the statistical evidence of discrimination, the court below insists, it must not be left to the trier of fact to weigh the defendant's explanations against even the most transparent of discharge patterns — to determine whether age, more likely than not, was a determining factor in the discharge.

In the Sixth Circuit, and perhaps elsewhere, statistics will prove useless as each plaintiff is forced to directly refute the defendant's explanation (usually that someone else was better qualified or more indispensable) in order to survive summary judgment or a directed verdict, while at least five other circuits will continue to hold that unusually compelling statistics, standing alone, can support a finding of disparate treatment. In that regard, even a decision by this Court *against* the petitioners, on the merits, would be far preferable to the current situation, in which the circuits are in disarray on a question critical to the effectiveness of the ADEA and all federal discrimination law.

The petitioners respectfully request, therefore, that this Honorable Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

RICHARD V. LEVIN
Counsel of Record
66 South Miller Road
Akron, Ohio 44333
(216) 836-5297
Attorney for Petitioners

Of Counsel:
LAURIE F. STARR
DAVID E. ROLOFF
GAINES & STERN
1700 Ohio Savings Plaza
Cleveland, Ohio 44114
(216) 781-1700

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 89–3104, and 89–3192 to 3195

JON F. BARNES, HOMER L. GIBSON, JEAN Z. GIPSON,
CLARENCE P. KENNEDY, WILLY P. KULHANEK,
NORMAN J. MUTH, FEBO C. SPAGNUOLO,
Plaintiffs-Appellants,

vs.

GENCORP INC.,
Defendant-Appellee.

THEOPHILOS A. MILLIS, RICHARD S. NOVITSKY,
MILAN A. ROLIK, NORMAN S. TROMMER,
Plaintiffs-Appellants,

vs.

DIVERSITECH GENERAL, INC.,
Defendant-Appellee.

Argued December 7, 1989.

Decided February 22, 1990.

As Amended April 30, 1990.

Rehearing and Rehearing En Banc Denied
In Nos. 89-3104 and 89-3193
April 30, 1990.

Before KEITH and KENNEDY, *Circuit Judges,*
and PECK, *Senior Circuit Judge.*

RICHARD V. LEVIN, Esq. (Argued)
66 South Miller Road
Akron, Ohio 44313

LAURIE F. STARR, Esq.
WILLIAM J. NOVAK, Esq.
Sindell, Rubenstein, Einbund, Pavlik,
Novak & Celebrezze
200 National City – East Sixth Building
Cleveland, Ohio 44114

Attorneys for Plaintiffs-Appellants

THOMAS H. BARNARD, Esq. (Argued)
LEE J. HUTTON, Esq.
DAVID J. SOMRAK, Esq.
Duvin, Cahn & Barnard
Erieview Tower, 20th Floor
1301 East Ninth Street
Cleveland, Ohio 44114

WILLIAM GORENC, JR., Esq.
GenCorp Inc.
175 Ghent Road
Fairlawn, Ohio 44313

Attorneys for Defendants-Appellees

CHARLES A. SHANOR
General Counsel

GWENDOLYN YOUNG REAMS
Associate General Counsel

LORRAINE C. DAVIS
Assistant General Counsel

CYNTHIA MISICKA, Esq.

Equal Employment Opportunity
Commission
2401 East Street, N.W., Room 224
Washington, D.C. 20507
Attorneys for Amicus Curiae
in Support of Plaintiffs-Appellants

OPINION OF THE COURT

KENNEDY, *Circuit Judge.*

In this consolidated appeal, plaintiffs-appellants challenge the District Court's grant of summary judgment for the defendants-appellees, their employers, in these age discrimination cases.[1] The cases arose from a corporate restructuring in which a number of employees, including the plaintiffs, were permanently discharged. The plaintiffs assert that they created a jury question by establishing a prima facie case of age discrimination under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and by setting forth facts to rebut the defendants' alleged nondiscriminatory reasons for the discharges. The defendants argue that the District Court correctly found that no prima facie case was established and, in the alternative, argue that the plaintiffs have not rebutted the proffered nondiscriminatory reasons for the discharges. We AFFIRM

[1] The cases were brought under the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. §§ 621, *et seq.*, and Ohio Rev. Code Ann. § 4101.17 (Anderson, 1980).

in part, REVERSE in part, and REMAND for further proceedings.

I. BACKGROUND

A. General Information

In March 1987, GenCorp was the target of a hostile tender offer by General Acquisition, Inc. GenCorp defended against this takeover attempt by instituting a $1.4 billion stock repurchase program financed by the sale of two GenCorp subsidiaries — General Tire, Inc., a tire manufacturing operation and GenCorp's largest subsidiary, and RKO Bottling, a soft drink bottling operation.[2]

Prior to the attempted hostile takeover, GenCorp maintained a Research Division headquartered in Akron, Ohio where seven of the plaintiffs were employed. The Research Division conducted research in three areas: (1) tire technology; (2) projects associated with GenCorp's automotive and polymer-based products; and (3) exploratory and support research. Following the divestiture of its largest subsidiary, GenCorp determined that it should curtail research activity and reduce the size of its Research Division staff. As a result, seven of the plaintiffs, as well as thirty-one other employees, were discharged. The specific decisions on which Research

---

[2] There is some confusion as to whether General Tire was sold before or after the reorganization. In any case, it appears the decision to sell the subsidiary was made prior to the reorganization that resulted in the staff cuts at issue in this case. Thus it is irrelevant for the purposes of this appeal.

Division employees were to be eliminated were made by upper management employees in the Research Division, including Russell Livigni, Director of the Research Division.

GenCorp's other subsidiaries, including DiversiTech, were also affected. DiversiTech instituted numerous cost-cutting measures including a hiring freeze, suspension of all training seminars, a 25% reduction in travel expenses, a 50% reduction in overtime, and the termination of all temporary help. Despite these measures, management was still required to reduce the payroll. The four DiversiTech plaintiffs and nine other employees were discharged after DiversiTech management determined that the positions occupied by the plaintiffs could be eliminated with the least disruption to company operations. The specific decisions were apparently made by Polymers Division President Howard Wheeler, who relied in part on recommendations made by upper-level management employees.

At both GenCorp and DiversiTech, no discharged employee whose position was eliminated was allowed to displace any other employee regardless of his or her relative seniority. The plaintiffs describe the so-called no-bump policy as an eleventh-hour change of position designed to enable the company to complete its discriminatory scheme. Both defendants deny that they had a bumping policy prior to the restructuring, but the plaintiffs have produced at least some evidence from which a jury could conclude that a policy existed. GenCorp cites the testimony of Russell Livigni, Director of the Research Division, who stated that the Division had never applied a bumping policy during his three-year

tenure. Fred A. Deaner, GenCorp's Director of Staffing, Development, and EEO, stated in his deposition that GenCorp did not have a "published policy" to allow bumping but did have a "practice" of allowing more senior employees to bump less senior employees. According to Deaner, the practice was eliminated "just prior" to the restructuring.[3] While Deaner stated later in his deposition that believed the policy was eliminated much earlier, this only creates a jury issue.

Similarly, there is some support for the existence and withdrawal of a bumping policy at DiversiTech. Richard D. First, DiversiTech's Director of Personnel, testified that while DiversiTech had no bumping policy, it did circulate a document to company personnel shortly before the reorganization stating that no bumping would be allowed. He explained that this step was taken because bumping had been allowed during a factory closure in 1981 or 1982.

B. Statistical Proof

The plaintiffs presented two statistical reports — one for the GenCorp plaintiffs and one for the DiversiTech plaintiffs — prepared by Harvey S. Rosen and John F. Burke, Jr. The defendants do not here challenge their credentials as expert statisticians. The two reports analyzed the termination patterns of the employees who were discharged during the force

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[3] Deaner did state, however, that he was not sure how the practice worked.

reduction. Both reports utilized information provided by the defendants.

1. GenCorp

In the *GenCorp* cases, Rosen and Burke calculated the termination rates in GenCorp's Research Division for employees age 48-and-over, 52-and-over, and 55-and-over, and for employees under ages 48, 52, and 55. The data included the number and percentage of employees in each age group in the Research Division prior to the work force reduction. The actual termination rates for each group were compared to the expected termination rates had employees been selected randomly for termination.

Data based on the 153 total staff members in the Research Division, 38 of whom were fired, revealed that the 48-and-over age group comprised 43.1% of the total employee population but 63.2% of those discharged. Twenty-four of the 66 employees, 36.4%, age 48-and-over were discharged. But only 14 of the 87 employees, 16.1%, under age 48 were discharged. The 52-and-over age group comprised 28.8% of the total employee population but 50% of those discharged. Nineteen of the 44 employees, 43.2%, age 52-and-older were eliminated. Only 19 of the 109 employees, 17.4%, under age 52 were discharged. The 55-and-over age group comprised 19.6% of the total employee population but 42.1% of those discharged. Sixteen of the 30 employees, 53.3%, age 55-and-over were eliminated. Only 22 of the 123 employees,

17.9%, under age 55 were discharged.[4] This data was presented to the District Court in a series of charts divided by age group. The significance of the data was explained in a cover letter to the plaintiffs' lawyers, a copy of which was submitted to the court.

In all but the age-48-and-over grouping, Rosen and Burke stated that "the Chi-Square statistic fell beyond three standard deviations from the hypothesized random result, indicating significantly higher-than-expected termination levels in the older age groups." The age-48-and-over grouping "produced a Chi-Square sufficiently close to three standard deviations that it yielded a probability or confidence level of 99.6 percent, compared with 99.7 percent for three standard deviations."[5] Rosen and Burke concluded their report by stating: "Based upon the foregoing analysis, I conclude that, to a virtual statistical certainty, age was a determining factor in the termination of the employees in each of the indicated groupings."

2. DiversiTech

Similar statistics were prepared in the *DiversiTech* cases for the 165 Polymers Division employees

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[4] A separate analysis was done excluding the 10 upper-level employees at the Research Division, none of whom were fired. This analysis yielded a slightly greater disparity between the termination rates of the older and younger groups.

[5] All calculations performed on groups excluding the senior management produced results more than three standard deviations from the expected random result.

age 55-and-over, age 60-and-over, and those under ages 55 and 60. A separate analysis was prepared for the 109 employees who worked in departments of the Polymers Division in which terminations occurred. This latter analysis presented less of a disparity between the termination rates of the older and younger groupings. Data based on the smaller 109 employee grouping revealed that the 55-and-over age group comprised 22% of the total employee population but 76.9% of those discharged. Ten of the 24 employees, 41.7%, age 55-and-over were discharged. Only 3 of the 85 employees, 3.5%, under age 55 were discharged. The 60-and-over age group comprised 7.3% of the total employee population but 53.8% of those discharged. Seven of the 8 employees, 87.5%, age 60-and-over were discharged. Only 6 of the 101 employees under age 60, 5.9% were discharged.

In a report accompanying the statistics, a Chi-Square statistic and a binomial distribution were obtained for the groups analyzed. Rosen and Burke concluded, "[i]n all of the calculations, the Chi-Square statistic reached virtually the 100% level of significance, indicating significantly higher than expected termination levels in the older age groups." Because the small number of employees age 60-and-over decreased the reliability of the statistics, Rosen and Burke confirmed the results of every group using a binomial analysis and found that "[i]n all four instances, the actual number of terminations in the stated categories deviated by more than four standard deviations from the expected terminations." Rosen and Burke again concluded their report by stating: "Based upon the foregoing analysis,

I conclude that, to a virtual statistical certainty, age was a determining factor in the termination of the employees in each of the indicated groupings."

C. Facts Related to Individual Cases

The facts related to each individual plaintiff's discharge are presented in Section III(C), *infra*.

II. PRIMA FACIE CASE

A. Standard

The plaintiffs argue that they have established a prima facie case of age discrimination under the standard established in *McDonnell Douglas*, 411 U.S. at 792, 93 S.Ct. at 1819.[6] In a broad sense, *McDonnell Douglas* set forth an analytical method to examine every intentional discrimination claim, whether it proceeds through an indirect method of proof or through direct, circumstantial, or statistical evidence.

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory

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[6] The *McDonnell Douglas* test requires a plaintiff to show the following in order to establish a prima facie case: (1) that he is a member of a protected class; (2) that he applied for a job and was rejected; (3) that he was qualified for the job; and (4) that the employer continued to seek job applicants after the plaintiff was rejected.

> reason for the employee's rejection." Third, should the defendant carry this burden, the plaintiff must then have the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-53, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981) (citations omitted).

In a narrower sense, however, the importance of the *McDonnell Douglas* "test" is its discussion of the elements a plaintiff must prove to establish a prima facie case of discrimination absent direct, circumstantial, or statistical evidence of discrimination.[7] In

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[7] When a plaintiff has established a prima facie case, he or she has established a "legally mandatory, rebuttable presumption" that the defendant discriminated. *Burdine*, 450 U.S. at 254 n.7, 101 S.Ct. at 1094 n.7. A defendant escapes this presumption by articulating a legitimate reason for the action.

> In saying that the presumption drops from the case, we do not imply that the trier of fact no longer may consider evidence previously introduced by the plaintiff to establish a prima facie case. A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence. Nonetheless, this evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual. Indeed, there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation.

McDonnell Douglas, the Supreme Court held that a plaintiff alleging racially motivated refusal to hire could establish a prima facie case by showing, *inter alia*, that he was qualified for the position and that it remained open after the employer refused to hire him. The rationale for not requiring direct, circumstantial, or statistical evidence of discrimination has been explored in later cases:

> Although the *McDonnell Douglas* formula does not require direct proof of discrimination, it does demand that the alleged discriminatee demonstrate at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought. Elimination of these reasons for the refusal to hire is sufficient, absent other explanation, to create an inference that the decision was a discriminatory one.

International Brotherhood of Teamsters v. United States, 431 U.S. 324, 358 n.44, 97 S.Ct. 1843, 1866 n.44, 52, L.Ed.2d 396 (1977).[8]

Id. at 255 n.10, 101 S.Ct. at 1095 n.10.

[8] The Court has also explained:

> A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if other wise unexplained, are more likely than not based on the consideration of impermissible factors. And we are willing to presume this largely because we know

We do not believe the same rationale applies to a work force reduction where the plaintiff has done no more than show the elements of the *McDonnell Douglas* formula that relate to his or her situation: (1) that he or she was age forty or over; (2) that he or she was qualified to perform the job; and (3) that he or she was discharged. When work force reductions by the employer are a factor in the decision, "the most common legitimate reasons" for the discharge are the work force reductions. By showing the other elements of a *McDonnell Douglas* case, a plaintiff has not presented any evidence indicating that the work force reductions are not the reasons for the discharge and therefore does not make out a prima facie case absent additional direct, circumstantial, or statistical evidence tending to indicate that the employer singled out the plaintiff for discharge for impermissible reasons. *LaGrant v. Gulf and Western Mfg. Co.*, 748 F.2d 1087, 1090 (6th Cir. 1984) ("[t]he mere termination of a competent employee when an employer is making cutbacks due to economic

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> from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race.

Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577, 98 S.Ct. 2943, 2949-50, 57 L.Ed.2d 957 (1978) (citation omitted) (emphasis in original).

necessity is insufficient to establish a prima facie case of age discrimination"); *McMahon v. Libbey-Owens-Ford Co.*, 870 F.2d 1073 (6th Cir. 1989); *Sahadi v. Reynolds Chemical*, 636 F.2d 1116, 1118 (6th Cir. 1980).

Our conclusion would not change even if a plaintiff additionally demonstrated that younger persons were retained in other jobs which the plaintiff was qualified to perform. A different result would allow every person age 40-and-over to establish a prima facie case of age discrimination if he or she was discharged as part of a work force reduction. *Sahadi*, 636 F.2d at 1118.[9]

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[9] This Circuit's decisions have not been entirely clear on when a plaintiff who establishes a prima facie case of age discrimination under *McDonnell Douglas* without providing other evidence of discrimination can escape summary judgment. In adapting the *McDonnell Douglas* test to a discharge case in which the plaintiff alleges age discrimination, a plaintiff would be required to demonstrate that:

(1) he was a member of the protected class [i.e., age-40-and-over];

(2) he was discharged;

(3) he was qualified for the position;

(4) he was replaced by a younger person.

Ackerman v. Diamond Shamrock Corp., 670 F.2d 66 (6th Cir. 1982) (citing *Marshall v. Goodyear Tire & Rubber Co.*, 554 F.2d 730, 735 (5th Cir. 1977)).

We have stated that the *McDonnell Douglas* test is not to be applied mechanically, instead opting for a case-by-case approach that focuses on whether age was in fact a determining factor in the employment decision. *See Merkel v. Scovill, Inc.*, 787 F.2d 174, 177 (6th Cir.), *cert. denied*, 479 U.S. 990, 107 S.Ct. 585, 93 L.Ed.2d 587 (1986); *Blackwell v. Sun Elec. Corp.*, 696 F.2d

It is important to clarify what constitutes a true work force reduction case. A work force reduction situation occurs when business considerations cause an employer to eliminate one or more positions within the company. An employee is not eliminated as part of a work force reduction when he or she is replaced after his or her discharge. However, a person is not replaced when another employee is assigned to perform the plaintiff's duties in addition to other duties, or when the work is redistributed among other existing employees already performing related work. A person is replaced only when another employee is hired or reassigned to perform the plaintiff's duties. *See Sahadi*, 636 F.2d at 1117 ("[p]laintiff was not replaced; his former duties were assumed by Alexander, who performed them in addition to his other functions").[10]

We do not believe this standard creates an undue hardship for age discrimination plaintiffs who are eliminated as part of a work force reduction. If the

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1176, 1179 (6th Cir. 1983) (holding that a plaintiff who could not demonstrate every element of the *McDonnell Douglas* test could nonetheless demonstrate a prima facie case); *Ackerman*, 670 F.2d at 70; *Sahadi*, 636 F.2d at 1118 (refusing to find a prima facie case where the plaintiff's position was eliminated but younger employees were retained in positions plaintiff was capable of performing and willing to relocate to perform); *Laugesen v. Anaconda Co.*, 510 F.2d 307, 312-13 n.4 (6th Cir. 1975).

[10] Of course an employer could not avoid liability by changing the job title or by making minor changes to a job indicative of an attempt to avoid liability. Further, a plaintiff could attempt to show that the force reduction was itself pretextual.

plaintiff was truly singled out for discharge because of age he or she should be able to develop enough evidence through the discovery process or otherwise to establish a prima facie case. For example, a plaintiff could establish a prima facie case by showing that he or she possessed qualifications superior to those of a younger co-worker working in the same position as the plaintiff. Alternatively, a plaintiff could show that the employer made statements indicative of a discriminatory motive as in *Laugesen*, 510 F.2d at 313. The guiding principle is that the evidence must be sufficiently probative to allow a factfinder to believe that the employer intentionally discriminated against the plaintiff because of age.

We turn then to the question of whether any or all of these plaintiffs have set forth sufficient direct, circumstantial, and/or statistical evidence to establish a prima facie case.

B. Statistical Proof

The Plaintiffs initially argue that the statistical evidence they have presented is sufficient to create an inference of discrimination as to all of them. We agree. Appropriate statistical data showing an employer's pattern of conduct toward a protected class as a group can, if unrebutted, create an inference that a defendant discriminated against individual members of the class. *Laugesen*, 510 F.2d at 317. *See also McDonnell Douglas*, 411 U.S. at 804-05, 93 S.Ct. at 1825 (defendant's general policy and practice with respect to minority employment may be relevant to showing of pretext). To do so, the statistics must show a significant disparity and eliminate the most common nondiscriminatory explanations for the

disparity. *Segar v. Smith*, 738 F.2d 1249, 1274 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115, 105 S.Ct. 2357, 86 L.Ed.2d 258 (1985). Since all of the discharged employees are arguably qualified in work force reductions, the most obvious explanations for the discharge of any one employee are lower proficiency and/or random chance. Since it is reasonable to presume at this stage of the case that skill is distributed randomly over any given age group and since the plaintiffs have shown that the results depart significantly from those that chance alone would predict, we believe that the statistics, on their face, establish a prima facie case of discrimination. *See, e.g., Castaneda v. Partida*, 430 U.S. 482, 497 n.17, 97 S.Ct. 1272, 1281 n.17, 51 L.Ed.2d 498 (1977) ("[a]s a general rule for such large samples, if the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the jury drawing was random would be suspect to a social scientist"); *NAACP v. City of Mansfield*, 866 F.2d 162, 168 (6th Cir. 1989). *See also Simpson v. Midland-Ross Corp.*, 823 F.2d 937, 944 (6th Cir. 1987) (" 'both the methodology and the explanatory power of the statistical analysis must be sufficient to permit an inference of discrimination' ") (citation omitted).[11]

The defendants attack the plaintiffs' statistics on several grounds. First, the defendants argue that the plaintiffs have artificially manipulated the statistics

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[11] Statistics for the 48-and-over age group into which Jon Barnes falls fell just less than three standard deviations. We need not decide whether Barnes established a prima facie case since we reject his claim in the pretext justification phase.

by choosing meaningless age categories — 48, 52, and 55-and-over versus those under 48, 52, and 55 for the GenCorp plaintiffs and 55 and 60-and-over versus those under 55 and 60 for the DiversiTech plaintiffs. The defendants argue that the only valid statistics would necessarily divide the employees into groups age 40-and-over and those under 40. We disagree. An employer violates ADEA when preference is given to a younger employee even if the younger employee is within the protected class of persons age 40-and-over. *See, e.g., McCorstin v. U.S. Steel Corp.*, 621 F.2d 749, 754 (5th Cir. 1980) (requiring a plaintiff to show that he or she was replaced by someone outside of the 40-and-over protected group "fails to take the reality of the working place into account. Because of the value of experience rarely are sixty-year-olds replaced by those under forty"); *Moore v. Sears, Roebuck and Co.*, 464 F.Supp. 357, 366 (N.D.Ga. 1979) ("[b]ecause age is a relative rather than absolute status when taken as a basis for discrimination, it need not follow that all persons protected by the act be grouped together for purposes of delineating the extent of their protection").[12] We believe that the plaintiffs are correct when they assert that the age groups are relevant on their face. If employees younger than a specific plaintiff have a statistically significant lower discharge rate, then it is obvious

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[12] Such sub-group analysis may not apply to discrimina-tory impact cases, however. *See Lowe v. Commack Union Free School Dist.*, 886 F.2d 1364 (2d Cir. 1989).

that the statistics — absent another explanation for the discharge — are probative of discrimination.[13]

Second, the defendants assert that the sample size is too small for the statistics to provide reliable results. They argue that a small change in the underlying data would produce a dramatic change in the outcome. The defendants have provided no evidence to support this assertion and, in any case, we believe this assertion, at least on its face, is incorrect.[14] Further, the plaintiffs' expert has asserted that the statistical pool is sufficient in size to render the results statistically reliable. At best the defendants' unsubstantiated assertion raises a

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[13] Of course the closer in age a retained employee is to a plaintiff, the less plausible it is that the statistics show the plaintiff was discharged because of age. For example, if the defendants showed that most of the nondischarged employees were 47-years-old, then the discharge statistics would likely not be probative in the case of a 48-year-old plaintiff. Significantly, however, the defendants have not shown or alleged that the statistical results would change if employees only a few years younger than a plaintiff were included in the statistical class with that plaintiff. With respect to the GenCorp plaintiffs age 50-and-over and the DiversiTech plaintiffs age 60-and-over, the plaintiffs' statistics would specifically undercut such an assertion. At the summary judgment stage, a plaintiff is not required to anticipate and rebut every possible weakness in his otherwise valid statistical evidence.

[14] For example, in the GenCorp cases if three persons in the 48-and-over age group had been retained and three persons in the under-48 group discharged then 31.8% of the older group would still have been discharged as compared to 19.5% of those younger than 48. The results would still have differed by more than a standard deviation from the expected random result.

question that cannot be resolved on this record. *See, e.g., Capaci v. Katz & Besthoff, Inc.*, 711 F.2d 647, 653-54 (5th Cir. 1983) ("[t]he defendant must do more than raise theoretical objections to the data or statistical approach taken; instead, the defendant should demonstrate how the errors affect the results").

Finally, the defendants argue that the assumptions used in framing the statistics remain unexplained. More specifically, the defendants argue that: (1) neither group of plaintiffs explains why statistics were prepared for the age groupings chosen; (2) the plaintiffs do not explain why the GenCorp set of statistics provide data excluding top management yet the DiversiTech data always includes top management; (3) the DiversiTech plaintiffs do not explain why the whole company, with the exception of a Texas plant, is used rather than a subset of the company; and (4) the GenCorp plaintiffs do not explain why the statistics were limited to the Research Center rather than the company as a whole. Since the plaintiffs have failed to answer these questions, the defendants argue, this Court should presume that the statistics were manipulated to produce "a preordained and partisan result."

Most of these questions can be answered from the facts of the case themselves. The first question is merely a restatement of a question already raised and answered above. The answer to the second question is largely irrelevant since the statistics are also calculated including the management employees. As to the third question, the Texas plant was not included because a decision had already been made to

transfer the plant from DiversiTech to another subsidiary of GenCorp, its parent company. Employees at this plant were apparently not considered in the restructuring.

The fourth question and the remainder of the third question challenge the relevance of including only the Polymers Division employees in the statistics for the *DiversiTech* cases and only the Research Division employees in the statistics in the *GenCorp* cases. Again the relevance of these statistics is apparent. As to the DiversiTech plaintiffs, all worked in the Polymers Division located in the Akron area. Apparently the decisions as to which employees were to be cut were made by the top management of the Polymers Division. Similarly, all of the GenCorp plaintiffs worked in the Research Division of GenCorp. The decisions as to which employees were to be cut by the Research Division were made by top management employees of this Division. In both cases we cannot say that it is illogical to include all of the employees who could have been considered by the management personnel involved in the decision.

The only serious problem with the statistics in this case — a problem not clearly raised by the defendants — is that all of the employees in each division are not interchangeable. Only a few employees occupy positions comparable to those occupied by each of the plaintiffs. While this diminishes the probative value of the evidence, we do not believe that it vitiates it. The discharge decisions were made by persons who had control over all of the division employees, not merely the employees who worked in each plaintiff's group.

And while the statistical disparity for any one group would not be significant because of the sample size, it remains significant that the older employees were discharged in each of several groups.[15]

III. PRETEXT.

The defendants have set forth legitimate, nondiscriminatory reasons for discharging each of the eleven plaintiffs. Each individual plaintiff was chosen for their discharge because his or her position was judged to be less essential to the company's continued operations and because other individuals in the same position, if any, were judged to be better qualified. The reasons are discussed with greater specificity as to each plaintiff in Section III(C), *infra*, along with a discussion of the individual rebuttal evidence that individual plaintiffs have presented.

The plaintiffs allege that the asserted reasons for the discharges are pretextual. In the alternative, plaintiffs argue that, even if the nondiscriminatory reasons are true, the defendants would not have acted absent an additional discriminatory motive. Thus the plaintiffs argue that the case could be considered one of mixed motives. The plaintiffs do not question the fact that the defendants discharged a large number of employees because of the reorgan-

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[15] There is arguably other evidence to support the establishment of a prima facie case. We need not address this evidence, however, since we believe the statistics alone present enough evidence to establish a prima facie case. Recognizing this possibility, the defendants have continually advanced legitimate, nondiscriminatory reasons for their actions.

ization. They merely assert that other employees would have been chosen for dismissal but for the age of each of the plaintiffs.

A. Statistical Rebuttal

The plaintiffs argue that the statistics used to establish a prima facie case would allow a jury to find that the defendants' proffered reasons for all of the discharges are pretextual. The defendants counter that statistics can never be used to show pretext. We are unwilling to hold that statistics could never form the basis for a rebuttal,[16] but we do not believe that the statistics presented in this case provide an adequate response to the defendants' explanations.

When a plaintiff's statistics indicate a disproportionate discharge rate for a protected group there are three possible explanations for the discrepancy: the operation of legitimate selection criteria, chance, or the defendant's bias. *See* D. Baldus and J. Cole, *Statistical Proof of Discrimination* 291 (1980); see also *Palmer v. Schultz*, 815 F.2d 84, 90-91 (D.C. Cir. 1987). When a plaintiff demonstrates a significant statistical disparity in the discharge rate, he or she has provided strong evidence that chance alone is not the cause of the discharge pattern. The statistics do not and cannot determine whether the more likely cause is the defendant's bias or a legitimate selection

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[16] For example, statistics could very well form the basis for a rebuttal if the defendants rebutted the plaintiffs' statistical evidence with statistical evidence of their own.

criterion.[17] We allow a plaintiff to establish a prima facie case without providing additional evidence that bias is the more likely cause of the discharge than legitimate explanations because we assume, absent some reason to believe the opposite is true, that job skills will be equally distributed across all age groups.[18]

There are several methods to attack a prima facie case established by statistics. A defendant may establish that the statistical method is faulty and show that chance is in fact a likely explanation for the apparent discrepancy. A defendant might also attack the nonstatistical presumption that a nondiscriminatory explanation is unlikely. One method of doing this is to show that job skills are not equally distributed over the particular employees in question. In a discriminatory hiring case, for example, a defendant might show that older applicants in the relevant hiring pool in fact had less training than their younger counterparts.

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[17] Similarly, statistical proof alone cannot establish the existence of a mixed motive case in individual discrimination cases. For a true mixed motive case to arise a plaintiff must present either direct or circumstantial evidence of the presence of a discriminatory motive.

[18] In a work force reduction case, unlike a hiring case, we can assume that all of the employees are qualified to perform their job since they were actually performing it at the time of their discharge.

A third possibility is the one actually chosen by the defendants in this case.[19] They have chosen to demonstrate that even if the plaintiffs' statistics and the court's assumption tend to indicate that bias could have played a role in some of the decisions, that bias did not play a role in the particular decision to discharge each of the plaintiffs. By presenting evidence that each plaintiff was less qualified than others occupying comparable positions, the defendants have undercut the importance of the plaintiffs' statistical proof.[20] This method of attacking a statistical prima facie case cannot be rebutted by reference to the statistics already presented since the statistics here do not tend to establish that age played a factor in any *particular* decision. Unless the plaintiffs can show that the defendants' explanations are inherently suspect or can present other direct or circumstantial evidence suggesting that the proffered reasons are not true, then the defendants are entitled to summary judgment.[21]

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[19] The possibilities are, of course, not exhausted by the illustrative list presented here.

[20] By presenting evidence that a large number of the discharged older employees were less qualified than the employees who were retained, the defendant may in fact undercut the statistical significance of the plaintiffs' statistics requiring a reconsideration of their probative value. The District Court is free to consider the continued value of the statistics on remand.

[21] While the plaintiffs' expert concluded that the statistics demonstrate "to a virtual statistical certainty [that] age was a determining factor in the termination of the employees in each of the indicated groupings," we do not believe that this conclusion is

B. The Bumping Policy

The plaintiffs also argue that the defendants' alleged elimination of the bumping rights shortly before the layoffs provides some evidence of discriminatory motives. This Circuit has clearly established that an employer has no duty under ADEA to permit an employee to transfer to another position or to displace workers with less seniority when the employee's position is eliminated as part of a work force reduction. *See, e.g., Ridenour v. Lawson Co.*, 791 F.2d 52, 57 (6th Cir. 1986) ("[w]here an employer reduces his workforce for economic reasons, it incurs no duty to transfer an employee to another position within the company"); *Simpson*, 823 F.2d at 942 n.6. The plaintiffs seek to distinguish these cases by asserting that unlike the prior cases, the defendants here actually had a bumping policy in place but eliminated it in anticipation of the reorganization.

The plaintiffs' argument might have merit if only a few employees had been discharged during the

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warranted. As the D.C. Circuit pointed out in *Palmer*, 815 F.2d at 91 (emphasis in original):

> A statistical analysis of a disparity in selection rates can reveal the *probability* that the disparity is merely a random deviation from perfectly equal selection rates. Statistics, however, cannot entirely rule out the possibility that chance caused the disparity. Nor can statistics determine, if chance is an unlikely explanation, whether the more probable cause was intentional discrimination or a legitimate nondiscriminatory factor in the selection process.

reorganization or if employees other than the plaintiffs had been allowed to bump those with seniority. It is also noteworthy that the plaintiffs' evidence does not show that a clear policy existed. Instead the policy — if it ever existed — was informal. While application of an informal bumping policy may not have caused serious disruptions in the past, the large scale reorganization that occurred when the plaintiffs were discharged presented a different situation. In a large reorganization such as this, we are unwilling to require an employer to further disrupt the business by forcing the employer to continue an informal bumping policy.[22]

C. Individual Factors

While the plaintiffs as a group cannot demonstrate facts sufficient to allow a finding of pretext, some individual plaintiffs are able to make such a showing. The defendants urge that as to each individual plaintiff it has established a legitimate, nondiscriminatory reason why that individual was discharged. The plaintiffs argue that even if the

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[22] It is important to note that we do not believe the plaintiffs have shown that the defendants deviated from an otherwise established seniority system. In this case the defendants merely made clear that an informal bumping policy that had sometimes been applied in the past would not be used during the mass reorganization. *Cf. Ayala v. Mayfair Molded Prods. Corp.*, 831 F.2d 1314 (7th Cir. 1987) (deviations from an otherwise observed seniority system when combined with other circumstantial evidence was enough to support jury verdict for the plaintiffs in work force reduction case).

proffered explanations are legitimate, then they presented enough evidence to allow a fact-finder to find the reason to be pretextual. We have already rejected the plaintiffs' argument that they could demonstrate pretext on a group-wide basis. We now address the argument that individual plaintiffs have presented enough evidence to allow a finding of pretext.

1. *GenCorp* Plaintiffs

a. Jon F. Barnes

Barnes was employed as a nontechnical research technician in the Polymers Research Section and was forty-eight-years-old at the time of his discharge. Barnes' duties consisted of laboratory characterization testing of polymers under the supervision of technical personnel.

Barnes was one of four nontechnical research technicians involved in polymer characterization. Two of these technicians were younger than Barnes, K. L. Hall and A. J. Kirschner. The third, J. W. Lea, was older than Barnes. Because GenCorp had sold its General Tire Division, it determined that only one nontechnical employee was necessary to continue polymer testing.

GenCorp selected Lea to remain as the sole nontechnical research technician in the Polymers Research Section. GenCorp claims that Lea was selected because of his superior skills; Lea apparently held the highest nontechnical classification in the lab. It is also noteworthy that Lea was the oldest of the four employees. Hall was also retained, but not

as a nontechnical employee. At the time of the layoffs Hall was one month short of receiving his B.S. in Chemistry. Once he received his B.S. he would become a technical employee in the lab.

A reasonable jury could not find that Barnes was discriminated against because of his age. Barnes does not challenge GenCorp's decision to retain only one nontechnical employee in the Polymers Research Section. Instead he argues that because of his experience and the quality of his past work, he should have been allowed to transfer to a different section of the Research Division. We have already rejected this contention. Only two of the persons occupying comparable positions in his department were retained. One of these two employees was younger than Barnes but was to receive his B.S. in Chemistry the following month and be promoted to another position. While the company retained Lea in a comparable position, Lea was older than Barnes and had a higher skills rating.

b. Homer L. Gibson

Gibson was employed as a research machinist in the machine shop and was fifty-five-years-old at the time of his discharge. Gibson provided machine services and other support to research activities and assisted in plant maintenance.

Gibson was one of three research machinists employed by GenCorp. R. G. Boyd was just over two years younger than Gibson and G. E. Dodson was six months older. Both had roughly the same experience and seniority as Gibson. Management determined that because of the decrease in research

activities only one of the three machinists was required after the restructuring. GenCorp argues that Boyd, the youngest of the three, was retained because his performance reviews were consistently higher than those of Gibson or Dodson and because he was considered the best machinist of the three by the Department Supervisor, W. Miller.

A reasonable jury could not find that Gibson was discriminated against because of his age. Gibson does not challenge the decision to eliminate two of three machinist positions, nor does he argue that he was more qualified than Boyd. Instead, he asserts that GenCorp should have allowed him to transfer to another position in the company, presumably by displacing another employee. We have already rejected this position. The younger machinist who was retained had higher performance reviews and was considered a superior machinist than Gibson.

c. Jean Z. Gipson

Gipson was employed as a library technician in the Technical Information Center and was fifty-seven-years-old at the time of her discharge. Gipson's duties included providing information resources to technical and professional personnel.

Gipson was one of two library technicians employed before the layoff. The other library technician was Norma K. Smith who was six and one-half years younger than Gipson. Smith had worked intermittently for GenCorp between 1956 and 1969. Smith had been rehired as a library technician approximately eight months before the reorganization. GenCorp determined that only one

of the two library technician positions would be needed after the reorganization.

GenCorp asserts that it retained Smith because it believed Smith was better qualified than Gipson because she possessed a B.S. in Chemistry and had in the past worked for GenCorp as a chemist. With her chemistry degree background she could act as a backup to the head of the technical information center in his absence. Gipson did not have a college degree and had worked in clerical and operative positions prior to becoming a librarian in 1979.

A reasonable jury could not find that Gipson was discriminated against because of her age. Gipson asserts that a college degree was not required for the position, that she had received high marks in her performance reviews, and that she helped train Smith after Smith was hired. She also asserts that Smith had not worked in the field of chemistry in over seventeen years. While Gipson did have more seniority than the person retained, she did not possess a college degree in chemistry, a useful skill for a librarian who works with chemists and chemical engineers and essential to acting as a backup to the head of the center. While Gipson asserts that a college degree was not required for her job, we do not believe that the age discrimination laws require an employer to retain an older employee over a younger employee merely because the older employee meets the minimum requirements. An employer is free to retain the younger, less senior employee if the employer reasonably believes he or she is better qualified for the position.

Gipson also alleges that she was not notified of three secretarial openings within the company for which she was qualified. An employer is not required to inform former employees of all openings which the former employee might be qualified to perform in order to avoid liability for an age discrimination charge. Gipson has not shown that younger employees were notified of other openings, nor has she alleged that she ever inquired about other positions with the company. *Cf. Ayala* 831 F.2d at 1320 (upholding plaintiffs' verdicts where plaintiffs showed they were not informed of other openings with the company even after inquiry).

d. Clarence P. Kennedy

Kennedy was employed as a non-technical research assistant to a group leader, P. T. Suman, and was fifty-nine-years-old at the time of his discharge. Suman, who was fifty at the time, and Kennedy were the only two employees in their group. Both Kennedy and Suman were involved in analyzing and synthesizing rubber compounds for use in tire rubber. Kennedy generally performed tests under Suman's supervision.

Because GenCorp sold its General Tire Division, management determined that it would eliminate one of the two employees in this tire rubber research group. Suman was retained because he performed more of the technical functions in the lab and, unlike Kennedy, possessed a B.S. in Chemistry.

A reasonable jury could not find that Kennedy was discriminated against because of his age. Kennedy's only argument is that he should have

been allowed to transfer to another position and bump a younger employee. We have already rejected this argument.

e. Willy P. Kulhanek

Kulhanek was employed as a non-technical research assistant in the Colloid and Surface Science Section and was fifty-two-years-old at the time of his discharge. Kulhanek worked in colloid/latex research, although the parties dispute the exact nature of his work. GenCorp asserts that Kulhanek spent most of his time working on colloid/latex characterization, testing the colloidal properties of latex compounds. Kulhanek admits that he performed testing but also claims he engaged in other development work.

Kulhanek was one of two nontechnical research assistants working in the Colloid Section. The other assistant, R. Simmons, was seventeen years younger than Kulhanek and had worked in the Colloid Section for only two years. Kulhanek trained Simmons in his job duties when Simmons transferred to the colloid group. GenCorp determined that it could eliminate one of the two positions at the time it restructured the company.

GenCorp argues that it chose to retain Simmons because he had "some training" in college-level chemistry that made him better qualified than Kulhanek and because he was better suited to the increased emphasis on new product development because he had done this type of work in the past.

Kulhanek survives summary judgment. Kulhanek does not challenge the decision to eliminate one of the two assistant positions in his department, but does allege that he was equally or better qualified. While GenCorp asserts that Simmons was better qualified than Kulhanek to work on new product development, the facts supporting this assertion are in dispute. Kulhanek alleges that he trained Simmons. While GenCorp alleges that Kulhanek did not have duties in product development, Kulhanek disputes this. Finally, while GenCorp does assert that Simmons had some college chemistry, GenCorp does not allege that he was degreed and does not specify what additional skills he gained that made him more qualified. Absent a degree or a showing that the retained individual gained specific skills we are unwilling to say that the defendant's assertion that Simmons had "some background" establishes greater expertise. Finally, Kulhanek argues that even if Simmons was better qualified, GenCorp should have allowed him to transfer to another position. We have already rejected this position.

f. Norman J. Muth

Muth was employed as a Supervisor in the Research Center Services Section of the Research Division and was fifty-six-years-old at the time of his discharge. Prior to his discharge he supervised the work of four clerical employees in the Services Section. GenCorp eliminated two of the clerical positions and determined that the remaining two employees should report directly to Muth's boss, W. L. Kollar.

A reasonable jury could not find that Muth was discriminated against because of his age. The facts as alleged by both parties establish that Muth's supervisory position was eliminated and that Muth's supervisory duties were divided between two of Muth's subordinates. As noted above, we do not believe that GenCorp was required to allow Muth to displace employees performing different duties merely because Muth was qualified to take over their positions and had more seniority with the company.

Muth also argues that he was not notified of two other openings for which he was qualified. Muth has not shown that younger employees were notified of other openings, nor has he alleged that he ever inquired about other positions with the company. Absent some inquiry about these other positions, we do not believe the failure to notify a discharged employee of positions with the company that opened after their discharge is evidence of discrimination.

g. Febo C. Spagnuolo

Spagnuolo was employed as a nonprofessional Laboratory Supervisor in the Polymer Physics and Physical Testing Section and was fifty-eight-years-old at the time of his discharge. Spagnuolo supervised the work of five research assistants who were engaged in the physical testing of tires and other rubber products.

Because of the decrease in physical testing, GenCorp eliminated an unknown number — two according to the plaintiff, four according to the defendant — of the assistants Spagnuolo supervised. GenCorp felt that the remaining assistants could be

supervised directly by the professional staff. Accordingly, the supervisory position Spagnuolo occupied was eliminated.

A reasonable jury could not find that Spagnuolo was discriminated against because of his age. While several of the employees Spagnuolo supervised were retained, we do not believe that this indicated that GenCorp discriminated against Spagnuolo. As already discussed, GenCorp was not required to allow its employees to bump employees performing different duties even if they had less seniority.

2. *DiversiTech* Plaintiffs

a. Theophilos A. Millis

Millis was employed as a Chief Chemist at the Mogadore plant and was sixty-two-years-old at the time of his discharge. Millis tested raw materials and new chemicals for use in manufacturing processes.

At the time of the restructuring, DiversiTech asserts that it was engaged in a program of single-sourcing and hoped to switch the testing of raw materials to the single source vendor's facilities. DiversiTech asserts that the program had already reduced the amount of testing performed by Millis, thus his position could easily be eliminated. Millis' younger subordinate, G. E. Miller, was primarily responsible for inprocess material testing which was not affected by this shift in raw material testing. Thus Miller was retained, continuing his in-process testing and assuming some of Millis' duties in addition to his own testing work.

Millis survives summary judgment. While DiversiTech asserts that Millis was fired because of a change in the company's raw material testing, there are facts on which a jury could rely to reject this conclusion. The Polymers Division President, Wheeler, stated in his deposition that the company did not have a policy of single-sourcing and had not reduced the amount of in-house testing of raw materials.

DiversiTech argues that this Court should not rely on Wheeler's deposition statements since Wheeler was not Millis' supervisor and did not make the termination decision. Instead DiversiTech asserts that the Plant Manager's opinion is most relevant. H. E. Jewett, the Plant Manager, supported DiversiTech's assertions on single-sourcing and raw materials testing. While DiversiTech argues that Wheeler did not make the decision to eliminate Millis, Wheeler did state that all proposed position reductions were cleared by him before they were implemented. Further, even if Wheeler was not involved in the decision, his statements still contradict the explanation given by Millis' plant supervisor. Additionally, Millis asserts that he should have been given the opportunity to replace Miller, a position we have already rejected.

b. Richard S. Novitsky

Novitsky was employed as the Manager of Ecology and Government Compliance at the Mogadore plant and was fifty-six-years-old at the time of his discharge. Novitsky had performed these duties since the position was created in November

1985. Novitsky had no subordinates and reported directly to the Latex Manufacturing Manager at the plant, H. E. Jewett. Jewett also had a background in environmental work.

DiversiTech determined that many of Novitsky's duties were redundant of functions performed or partially performed by other personnel. The position was eliminated and the nonredundant duties divided among four other persons occupying different positions: (1) Latex Manufacturing Manager, H. E. Jewett; (2) Personnel Administrator, OSHA/EEO, L. E. Gulka; (3) Safety Inspector, T. C. Stokes; and (4) Senior Process Engineer, R. A. Newgent.

A reasonable jury could not find that Novitsky was discriminated against because of his age. Novitsky's central argument is that he should have been allowed to fill other positions with the company, including the position occupied by Stokes. As already stated, we do not believe that the company was required to allow bumping. Novitsky also asserts that Polymers Division President Wheeler contradicted DiversiTech's stated reasons for discharging him. When Wheeler was asked "were there other individuals that were performing the same work as [Novitsky]" prior to Novitsky's discharge, Wheeler responded that there were not. We do not believe that this undermines DiversiTech's explanation, however. Consistent with DiversiTech's explanation, Wheeler stated that Novitsky's job functions were divided between several individuals and that Novitsky's position was not recreated after his discharge. When asked whether another individual was doing "the same"

job as Novitsky before his discharge, Wheeler gave the correct answer. No one was doing "the same" job, even though other persons were performing related or overlapping work. We do not believe that the plaintiffs can rely on the answer to an isolated and ambiguous question to create an issue of fact for trial.

c. Milan A. Rolik

At the time of his discharge, Rolik was employed as a Senior Chemist in the Analytical Laboratory and was sixty-years-old. Rolik's duties involved training, developmental work, and microscopy work.

DiversiTech alleges that it eliminated Rolik's position because his duties could be easily assumed by the other professional laboratory employees, all of whom were younger than Rolik. The two other senior chemists occupying similar positions were chosen over Rolik because Rolik's last performance report showed basic deficiencies in his analytical chemistry skills. Another of Rolik's supervisors, S. J. Loinek, described Rolik's skills as "outdated."

Rolik not only challenges the accuracy of his last evaluation, he also alleges the his firing was merely the last act in a long series of discriminatory acts by DiversiTech intended to force him to leave the company. He points out that at the time of his December 1985 evaluation he had been performing the work of a Senior Chemist for less than two weeks. In the two months before this he had been filling in for a hospitalized technician. More importantly, however, he alleges that it was highly unusual to have given him a performance review at

that time. According to Rolik, performance reviews were usually given on a yearly basis. Finally, he was transferred to the analytical group only under protest, feeling that his training and experience were not suited to this type of work. Thus, according to Rolik, his transfer to Analytical Chemistry was part of a discriminatory scheme to force him to leave the company.

Rolik alleges that the pattern of discrimination against him began in 1984 when his position as Pilot Plant Manager was eliminated. He filed a complaint with the EEOC at this time. The Company did not fire him, however. It kept him on at a series of temporary jobs until placing him in the Analytical Laboratory — over his objections — in October 1985. Rolik alleges that he applied for several other permanent positions but was always rejected in favor of younger applicants. Many of the temporary assignments he was given were allegedly dirty and dangerous, including scraping old tools and parts and disposing of outdated and unlabeled chemicals. In March 1986, after his transfer to Analytical Chemistry, he was informed that his salary would be reduced by more than $20,000 to $29,000. Only after writing numerous letters objecting to his pay cut — and voicing his concern that he might be the victim of age discrimination — was the pay cut rescinded.

Rolik survives summary judgment. Rolik does not claim that he was more qualified than the other persons occupying his position. Instead he relies on his lack of qualifications to challenge the decision to transfer him to the Analytical Group. Rolik alleges

that this action was merely one of a series of actions intended to force him to resign.

While the issue is a close one, we believe that the series of actions taken by DiversiTech over the prior months could be seen as discriminatory. Rolik alleges that he applied for and was denied several jobs given to younger applicants. He also alleges that he was given a series of dirty and dangerous assignments and that the company attempted to drastically cut his salary. While DiversiTech has justified its decision to discharge Rolik from his last position, it has not presented any justification for its prior actions.

The other DiversiTech plaintiffs allege that they can rely on Rolik's poor treatment to rebut DiversiTech's alleged nondiscriminatory reasons for discharging them. We disagree. The basic question is whether the plaintiffs were as qualified as other younger individuals in comparable positions. Any discrimination directed at Rolik has nothing to do with the relative qualifications of the other plaintiffs. Even if Rolik's treatment was discriminatory, this evidence alone would not be sufficient to entitle another plaintiff to a jury verdict where DiversiTech has shown the plaintiff to be less qualified than others in the position. Further, the plaintiffs have not shown that the same upper level management was involved in the decisions to eliminate their positions.

d. Norman S. Trommer

Trommer was employed as a Senior Process Engineer and was sixty-one-years-old at the time of

his discharge. Trommer performed various duties related to the tire cord adhesive and carpeting textile markets.

Trommer was one of three Senior Process Engineers, all of whom reported to the Chief Process Engineer, M. J. Wise. The other two, V. A. Farone and R. A. Newgent, were younger than Trommer and had less seniority. Trommer had a chemistry background while both Farone and Newgent had chemical engineering backgrounds. Farone was primarily responsible for the paper and latex markets. Newgent worked with the tire cord adhesive and new product markets.

DiversiTech asserts that Trommer's position was eliminated because of the product lines he served. DiversiTech felt that the textile markets served by Trommer were mature markets in a state of decline, and therefore the company decided to begin withdrawing from them. It asserts that Trommer's position was eliminated along with other technical and sales positions in the textile area.

Trommer survives summary judgment. While DiversiTech asserts that he was selected for discharge over his peers because the textile market he served was in decline, this position is undercut by Wheeler's deposition testimony. Wheeler stated that the textile market he served was not in decline when the layoffs occurred, that no decision had been made to withdraw from the market, and that textiles continued to constitute a large portion of DiversiTech's business. Trommer also asserts that he had more responsibility in the tire cord market than did Newgent. While Trommer's supervisor may have

given testimony to the contrary, we believe that Wheeler's testimony and Trommer's testimony created a fact question which cannot be resolved on this record.

IV. CONCLUSION

For all the reasons stated above, the judgment of dismissal is AFFIRMED as to plaintiffs-appellants Jon F. Barnes, Homer L. Gibson, Jean Z. Gipson, Clarence R. Kennedy, Norman J. Muth, Febo C. Spagnuolo, and Richard S. Novitsky. It is REVERSED as to plaintiffs-appellants Willy P. Kulhanek, Theophilos A. Millis, Milan A. Rolik, and Norman S. Trommer, and REMANDED for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JON F. BARNES (C88-1689A), HOMER L. GIBSON (C88-1687A), JEAN Z. GIPSON (C88-0557A), CLARENCE P. KENNEDY (C88-0555A), WILLY P. KULHANEK (C88-1690A), NORMAN J. MUTH (C88-0556A), FEBO C. SPAGNUOLO (C88-0851A),
Plaintiffs,

vs.

GENCORP INC.,
Defendant.

MEMORANDUM OPINION

DOWD, J. December 16, 1988

I. INTRODUCTION.

The above-captioned cases are brought by the plaintiffs against the defendant, GenCorp Inc., as a result of the defendant's reorganization and subsequent discharge of the plaintiffs in 1987. The plaintiffs' claims are based upon Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq*. The plaintiffs have also brought state pendent claims alleging violation of Ohio Revised Code § 4101.17,

negligent infliction of emotional distress, and breach of an implied contract.[1]

The seven cases consolidated for trial represent seven out of eleven cases filed against GenCorp alleging the same claims.

II. BACKGROUND.

The facts are relatively simple and undisputed. In March, 1987, GenCorp purchased a large amount of its own stock at a cost of approximately 1.4 billion as a defense to an unsolicited tender offer. The purchase of the stock by GenCorp was financed by the sale of two of its largest subsidiaries General Tire, Inc. and RKO Bottling. General Tire is engaged in the manufacture of tires.

GenCorp maintains a research division headquartered on Gilchrist Road in Akron, Ohio, where the seven plaintiffs in the above-captioned cases were employed. Before the corporate reorganization, approximately 154 persons were employed at the Research Division in a variety of positions. Prior to the GenCorp reorganization, i.e., the sale of General Tire and RKO, the Research Division conducted research in three general areas: (1) tire technology; (2) projects in GenCorp's Automotive and Polymer based products; and (3) "exploratory and support research."

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[1] In the plaintiffs' complaint they also allege breach of an express contract. The plaintiffs now represent that they wish to withdraw that claim.

Subsequent to the sale of General Tire, GenCorp determined that all of the research positions at the Research Divisions could no longer be justified. Consequently, GenCorp engaged in an examination of each position at the Research Division and in the positions determined to be no longer necessary, GenCorp either eliminated the position or retained incumbent employees over other employees. Thirty-nine persons were discharged as a result of the restructuring.

Against the backdrop of the overall corporate reorganization, the specific facts surrounding the discharge of each of the seven plaintiffs will be discussed below in order to provide additional background.

A. Jon F. Barnes.

Jon F. Barnes was employed as a non-technical research technician in the polymer structure section and was forty-eight years old at the time of his discharge. Mr. Barnes' duties consisted of laboratory characterization testing of polymers under the supervision of technical personnel.

Mr. Barnes was one of four non-technical research technicians involved in polymer characterization. In addition to Mr. Barnes, K.L. Hall, Date Of Birth ("DOB") 4-17-61, A. Kirschner, DOB 5-2-47, and J. W. Lea, DOB 9-14-32, were employed as non-technical research technicians. GenCorp concluded that only one non-technical employee was needed subsequent to the restructuring.

GenCorp retained Mr. Hall, DOB 4-17-61, because he was one month short of receiving his bachelor of science degree and would therefore become a technical employee as opposed to a non-technical employee. Mr. Lea was ultimately selected to remain as the sole non-technical research technician in a polymer structure section. GenCorp claims that Mr. Lea was selected because his skills were superior to both those of Mr. Barnes and Mr. Kirschner. GenCorp claims that Mr. Lea held the highest ranking non-technical classification and had extensive experience as a result of his thirty-three years of experience.

B. Jean Z. Gipson.

Ms. Jean Z. Gipson was employed as a library technician in the Technical Information Center at the Research Division. Ms. Gipson was fifty-seven years old at the time of her discharge. Ms. Gipson's duties as a library technician included providing infor-mation resources to technical and professional personnel. Ms. Gipson was one of two library technicians employed at the Research Division. GenCorp decided that only one library technician was needed after the restructuring.

GenCorp decided to retain the other library technician, Norma K. Smith, DOB 3-1-36, as opposed to the plaintiff because the defendant concluded that Ms. Smith was better qualified. The defendant asserts that Ms. Smith was selected because her job knowledge, skills and abilities were deemed superior to those of Ms. Gipson. The defendant also asserts that Ms. Smith held a bachelor of science degree in

chemistry and prior to holding the job of library technician had been a chemist for GenCorp.

The plaintiff, however, asserts that she was better qualified for the position of library technician and in fact trained Ms. Smith. The plaintiff also argues that Ms. Smith had been employed for only nine months prior to the discharge of the plaintiff who had approximately thirty years of continuous service. Ms. Smith was employed by GenCorp on and off over a thirty-one year period. Moreover, the plaintiff argues that Ms. Smith's chemistry degree was earned many years earlier and that a chemistry degree is not required for the position of library technician.

C. Homer L. Gibson.

Homer Gibson was employed as a research machinist in the machine shop and was fifty-five at the time of his discharge. Mr. Gibson was responsible for providing machine services and support to research activities. Mr. Gibson was also required to provide assistance in plant maintenance.

Mr. Gibson was one of three research machinists employed by the defendant in the Research Division. Of the three research machinists employed in the machine shop, Gibson, R. G. Boyd, DOB 2-9-33, and G. E. Dodson, DOB 11-23-30, only Mr. Boyd was retained. GenCorp decided that only one research machinist was required after the corporate restructuring effort.

Mr. Boyd was ultimately retained as the sole research machinist. The defendant asserts that Mr. Boyd was retained because of his superior

knowledge, skills and abilities as compared to Mr. Dodson and Mr. Gibson. Moreover, the defendant contends that Mr. Boyd's performance reviews were consistently higher than those of Mr. Dodson and Mr. Gibson.

D. Clarence R. Kennedy.

Mr. Clarence Kennedy was employed as a non-technical research assistant assigned to the group leader P. T. Suman, DOB 10-8-37. Mr. Kennedy was fifty-nine years old at the time of his discharge. Both Mr. Kennedy and Mr. Suman were involved in analyzing and synthesizing rubber compounds for the use in tire rubber. Mr. Kennedy's primary responsibility was to conduct laboratory tests of rubber compounds under the supervision of P. T. Suman.

Mr. Suman, the supervisor, was retained over Mr. Kennedy. The defendant determined that only one of the persons doing the rubber compound research was necessary following the sale of General Tire. Mr. Suman was retained, according to the defendant, because he possessed superior skills over Mr. Kennedy.

The defendant asserts that Mr. Suman held a bachelor of science degree in chemistry and performed all the technical functions related to rubber compound research, while Mr. Kennedy had no college degree and his prior experience was limited to non-technical support.

E. Willy P. Kulhanek.

Mr. Willy Kulhanek was employed as a non-technical research assistant in the Colloid and Surface Science Section and was fifty-two at the time of his discharge. Mr. Kulhanek was one of two non-technical research assistant employed in the Colloid and Surface Science Section. After the sale of General Tire, GenCorp determined that only one non-technical research assistant was necessary in the Colloid and Surface Science Section and determined that Mr. Simmons, DOB 4-5-52, would be retained over the plaintiff Kulhanek.

The defendant asserts that Mr. Simmons was selected to remain as the one non-technical research assistant because his skills, abilities, and job knowledge were deemed superior to those of Mr. Kulhanek. The defendant asserts that Mr. Simmons had a background in college level chemistry and had been involved in improving properties of latex compounds, one of the areas important to developing new material and product lines. On the other hand, Kulhanek possessed no background in college chemistry and his duties were sharply limited after the sale of General Tire in GenCorp's view.

The plaintiff Kulhanek asserts that he trained Mr. Simmons in his new job responsibilities and functions when he came to this section. The plaintiff also contends that the defendant employed inconsistent criteria when evaluating Mr. Kulhanek's job position.

F. Norman J. Muth.

Mr. Norman Muth was employed as a Supervisor in the Research Center Services Section of the Research Division and was fifty-six years old at the time of his discharge. Mr. Muth supervised four clerical workers in the Services Section. After the sale of General Tire and the overall reorganization of GenCorp, GenCorp determined that only two clerical workers were needed as opposed to four and the two remaining clerical workers would in turn be supervised by Mr. Muth's supervisor. In essence, GenCorp reduced the number of persons supervised by the plaintiff and eliminated his middle supervisory position and redistributed his supervising duties to his supervisor.

The plaintiff contends that the defendant did not consider retaining the plaintiff despite GenCorp's decision to retain two of the plaintiff's subordinates. Moreover, the plaintiff argues that the defendant posted "a new job opening" that in essence was the position of the plaintiff's and because the defendant did not consider the plaintiff for that "new job opening," the defendant's asserted reasons for discharge were pretext.

G. Febo C. Spagnuolo.

Mr. Febo Spagnuolo was employed as non-professional laboratory supervisor in the polymer physics and testing section and was fifty-eight years old at the time of his discharge. After the sale of General Tire and GenCorp's reorganization, GenCorp

determined that intermediate level supervisor positions would be eliminated.

The defendant asserts that because Mr. Spagnuolo's primary area of concentration was in the physical testing, his services were no longer needed along with the four research assistants in the physical testing section. The defendant contends that the remaining physical testing after the sale of General Tire would be performed on an *ad hoc* basis by the professional research scientists and research physicists who remain in the section. Accordingly, the plaintiff Spagnuolo's position was simply eliminated.

The plaintiff maintains that the four research assistants' positions were not eliminated, but instead two of Spagnuolo's subordinates were retained over the plaintiff.

III. SUMMARY JUDGMENT STANDARD.

It is well established that when considering a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, "the inferences to be drawn from the underlying facts contained in [affidavits, pleadings, depositions, answers to interrogatories, and admissions] must be viewed in the light most favorable to the party opposing the motion." *U.S. v. Diebold*, 369 U.S. 654, 655 (1962); *United States v. Hodges X-Ray, Inc.*, 759 F.2d 557 (6th Cir. 1985); *Tee-Pak, Inc. v. St. Regis Paper Co.*, 491 F.2d 1193 (6th Cir. 1974); *Bohn Aluminum& Brass Corp. v. Storm King Corp.*, 303 F.2d 425 (6th Cir. 1962). However, the non-moving party bears the responsibility to demonstrate that

summary judg-ment is inappropriate under Rule 56(e). The "adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or otherwise . . . , must set forth specific facts showing there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." Fed. R. Civ. P. 56(e).

A court may grant summary judgment only if there are no issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "[T]he judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "[T]here is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." *Id.* (citing *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970); *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 258 (1968)). Therefore, "[i]f the evidence is merely colorable, . . . , or not significantly probative, summary judgment may be granted. *Id.* (citing, *Dombrowski v. Eastland*, 387 U.S. 82 (1967); *Cities Service*). Moreover, summary judgment is appropriate when the non-moving party "has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

In sum, "[t]he inquiry performed is the threshold inquiry of determining whether there is the need for a trial — whether, in other words, there are any

genuine issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson*, 477 U.S. at 250.

IV. ANALYSIS.

The basic elements of proof in age discrimination actions are settled. *See, Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Ridenour v. Lawson Co.*, 791 F.2d 52 (6th Cir. 1986); *Blackwell v. Sun Electric Co.*, 696 F.2d 1176 (6th Cir. 1983).

Initially, the plaintiffs bear the burden of coming forth with evidence that establishes a *prima facie* showing of discrimination. The Sixth Circuit has defined the plaintiffs' initial burden as producing enough evidence to shift the burden of production, as compared to the burden of persuasion, to the defendant. *Ridenour*, 791 F.2d at 55 (citing *Halsell v. Kimberly-Clark Corp.*, 683 F.2d 285 (8th Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983)). Once that *prima facie* showing is made, the defendant has the obligation of coming forward and articulating some legitimate nondiscriminatory reason for its actions. *Burdine*, 450 U.S. at 254. If the defendant meets this obligation, the plaintiffs then must persuade the trier of fact that the articulated reason was a mere pretext for discriminatorily motivated action. *Burdine*, 450 U.S. at 255-56; *Ridenour*, 791 F.2d at 56. Despite the shifting burdens of production, the "burden of persuasion rests upon the plaintiff throughout the proceedings. . . ." *Ridenour*, 791 F.2d at 56 (citing, *Burdine*, 450 U.S. at 256).

On a summary judgment motion the required elements of proof under Title VII are "telescoped." *McKenzie v. Sawyer*, 684 F.2d 62, 71 (D.C. Cir. 1982). "The undisputed evidence in the record . . . should both raise the inference of discrimination and foreclose the possibility that [the defendant] could offer non-pretextual reasons for the challenged practice [ ]." *McKenzie*, 684 F.2d at 71.

Typically, a plaintiff can prove a *prima facie* case if the four factors of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) are established.[2] Under the *McDonnell Douglas Corp.* criteria, the plaintiff may establish a *prima facie* case when he or she demonstrates that: (1) he or she is a member of the protected class; (2) he or she was subjected to an adverse employment action; (3) he or she was qualified for the position; and (4) he or she was replaced by a younger person. *McDonnell Douglas Corp.*, 411 U.S. at 802; *Simpson v. Midland-Ross Corp.*, 823 F.2d 937, 940 (6th Cir. 1987) (citing *Wilkins v. Eaton Corp.*, 790 F.2d 515, 520 (6th Cir. 1986)). The *McDonnell Douglas* criteria is not the sole method of proof and "[a] plaintiff may also show through circumstantial, statistical, or direct evidence that he has been discriminated against." *Simpson*, 823 F.2d

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[2] The parties agree that the standards of proof under O.R.C. § 4101.17, the Ohio state statute prohibiting age discrimination, is the same as the federal standards. *See, Barber v. Scovill, Inc.*, 6 Ohio St. 3d 146 (1983); *Merkel v. Scovill, Inc.*, 787 F.2d 174, 178-79 (6th Cir. 1986); *McLaurin v. Fischer*, 768 F.2d 98, 105 (6th Cir. 1985). Accordingly, the Court will not differentiate between the state and federal age claims throughout the opinion, but the resolution of both is to be presumed.

at 940 (citing *Blackwell v. Sun Electric Corp.*, 696 F.2d 1176, 1180 (6th Cir. 1983). Moreover, the Sixth Circuit Court of Appeals has refused to mechanically apply the *McDonnell Douglas* factors to age discrimination cases and instead has adopted an approach of a case by case analysis. *Blackwell v. Sun Elec. Corp.*, 696 F.2d 1176, 1179 (6th Cir. 1983); *Laugesen v. Anaconda Co.*, 510 F.2d 307, 312 (6th Cir. 1975).

Proof of the plaintiff's *prima facie* case, however, is complicated in the context of a reduction in force discharge case such as these cases. "[A]n ADEA plaintiff who has been terminated amidst a corporate reorganization carries a greater burden of supporting charges or discrimination than an employee who was not terminated for similar reasons." *Ridenour v. Lawson Co.*, 791 F.2d 52, 57 (6th Cir. 1986). "The plaintiff in such reorganization cases must come forward with additional direct, circumstantial, or statistical evidence that age was a factor in his termination in order to establish a *prima facie* case." *LaGrant v. Gulf & Western Mfg. Co., Inc.*, 748 F.2d 1087, 1091 (6th Cir. 1984) (citing *Williams v. General Motors Corp.*, 656 F.2d 120 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982)). *See, also, Simpson v. Midland-Ross Corp., supra.*

In this case, the defendant argues that the plaintiffs cannot establish a *prima facie* case under the four factors enunciated in *McDonnell Douglas* in the context of a reduction in force situation because the plaintiffs were never replaced by younger employees. Further, the defendant argues that the plaintiffs have not come forward with any additional direct, circumstantial, or statistical evidence that

would establish that age was a determining factor in the defendant's decision to terminate plaintiffs. Moreover, the defendant argues that even if the plaintiffs can establish a *prima facie* case of age discrimination, the defendant has articulated a nondiscriminatory reason for its decision, i.e., corporate reorganization due to economic necessity. Last, the defendant argues that there is absolutely no evidence in the record that would establish that the defendants' articulated reason was a pretext for discriminatory conduct.

The plaintiffs do not rely on a strict application of the four factors enunciated in *McDonnell Douglas*, but rather argue that statistical and circumstantial evidence presented in opposition to the defendant's motion for summary judgment establish a *prima facie* case on behalf of the plaintiffs. The plaintiffs rely on a language in *Simpson* which states that "[a] plaintiff may also show through circumstantial, statistical, or direct evidence that he has been discriminated against." *Simpson*, 823 F.2d at 940.

The Court turns to an examination of the plaintiffs' evidence in the face of the defendant's motion for summary judgment.

The plaintiffs have supplied the Court with statistical evidence in the form of a report from Harvey S. Rosen. Plaintiffs' Exhibit 3. Mr. Rosen is an associate professor of economics at Cleveland State University. Affidavit of Harvey S. Rosen, ¶ 1. Mr. Rosen has prepared a report consisting of three pages of text and six pages of statistical data regarding the termination pattern that occurred in the research division of the defendant. *Id.* at ¶ 3.

The statistical report supplied to the Court while presumably accurate, is not accompanied by an explanation or indication of its relevance to the facts of the plaintiffs' case. The statistical evidence is referenced in the plaintiffs' brief on four occasions: page 2; page 3; page 13; and page 14. However, the references do not explain the relevancy or the manner in which the statistical evidence was compiled. Rather, the plaintiffs argue that "a standard deviation greater than three, convincingly indicates that older employees were disproportionately impacted by defendant's termination decisions and were selected for discharge on the basis of age." Plaintiffs' Brief in Opposition, p. 13.

In *Simpson v. Midland-Ross Corp.*, 823 F.2d 937 (6th Cir. 1987), the plaintiff presented statistical evidence in support of his age discrimination claim and did not rely on any direct or circumstantial evidence to prove his claim. The case was submitted to the jury and the jury found that the employer willfully violated the ADEA, as well as the state age statute, and awarded damages. *Simpson*, 823 F.2d at 939-40. The district court denied the employer's motion for judgment notwithstanding the verdict. The Sixth Circuit reversed and found that it was error for the district court to deny the J.N.O.V. motion.

In evaluating Simpson's proof, the court discounted the value of Simpson's statistical evidence and concluded that it lacked sufficient probative value. In doing so, the Sixth Circuit stated:

> Statistical evidence . . . does not differ greatly from other types of proof. It is relevant, even

> when believed, only if it tends "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Statistics gain relevance in one of two ways: the statistics, standing alone, reasonably lead to a particular conclusion validated by human experience, or comparative statistics point out discrepancies in behavior that would cause the average person to scrutinize the employer's motives. Unless the statistics, standing alone or in comparison, are sufficient to lead the mind naturally to the conclusions sought, they have no probative value; they do not move the proof one way or another. "In short, their usefulness depends on all the surrounding facts and circumstances." *Teamsters v. United States*, 431 U.S. 324, 340 (97 S.Ct. 1843, 1856, 52 L. Ed. 2d 396 (1977)).

Simpson, 823 F. 2d at 944. The Sixth Circuit went on to state that "[f]or statistics to be valid and helpful in a discrimination case, 'both the methodology and the explanatory power of the statistical analysis must be sufficient to permit an inference of discrimination.' " *Id.* (citing *Segar v. Smith*, 738 F.2d 1249, 1274 (D.C. Cir. 1984)).

In this case, the plaintiffs have not explained the significance of the statistical analysis, nor offered any explanation of the methodology. Rather the plaintiffs have offered the Court the report of the expert for the Court's own review and presumably its

own conclusion. The statistics stand alone and offer no probative evidence of discrimination.

Nonetheless, the Court has carefully reviewed the three-page report of the expert along with the six pages of computations. That review, however, lacked in substance because the Court could not evaluate the probative value of the statistical report without an explanation of what the report stands for or compares. For example, the report states:

> An analysis of 153 employees (the entire research division as of May 1, 1987) was conducted. Thirty-eight employees of the division were terminated on or about that date, including sixteen of the thirty employees of age fifty-five or older, nineteen of the forty-four employees of fifty-two or older and, twenty-four of the sixty-six employees of age forty-eight or older. When the employees at the level of manager or higher are excluded (none of whom were terminated), the terminations then include sixteen of the twenty-four employees of age fifty-five or older, nineteen of the thirty-six employees of age fifty-two or older, and twenty-four of the fifty-eight employees of age forty-eight or older.

Plaintiffs' Exhibit 3 at p. 1. The Court is at a loss as to why the expert subdivides the age groups over age forty. The defendant attacks the same point. The plaintiffs attempt to offer an explanation in their reply brief, by the Court finds the explanation to be unconvincing. The plaintiffs assert that the age groups selected by the expert "merely reflect [ ] the

realities of the defendant's discriminatory conduct. . . ." Plaintiffs' Reply Brief at p. 4.

In sum, the Court finds that the statistical evidence in this case simply does not provide probative evidence on the issue of age discrimination. *See, Simpson*, 823 F.2d 937 at 944 ("[s]tatistics such as those offered may be interesting perhaps, but are fundamentally irrelevant to the age discrimination claim." *Id.*)

The plaintiffs argue that there is "considerable circumstantial evidence" establishing discrimination on the part of the defendant. The plaintiffs argue that the circumstantial evidence consists of inconsistent reasons advanced by the defendant for plaintiffs' terminations, the defendant posted a job opening to fill Mr. Muth's position after his termination, the preferential treatment of younger employees in the form of job retentions and reassignments, the defendant's reversal of its bumping policy, and the defendant's adoption of a 1987 work force reduction guidelines which reflect a "cover-up."

First the plaintiffs argue that inconsistent reasons are advanced by the defendant for the various plaintiffs' terminations. For example, the plaintiffs argue that in the case of Mr. Kulhanek's dismissal, his six years of experience of seniority were disregarded while in the case of Mr. Jon Barnes, the defendant's decision to retain other employees was in part based upon years of experience and seniority. The defendant does not dispute that each position at the research division was examined on a case by case basis. The plaintiffs have supplied the Court with no

direct or circumstantial evidence that would establish that these inconsistent reasons were motivated by age. Consequently, the Court finds that it is undisputed that each position was examined on a case by case basis and that while different factors were examined in each position, there is no evidence in the record that raises an inference that the reasons employed in that examination were motivated by age.

The plaintiffs next argue that the posting of a job opening to fill Mr. Muth's position is circumstantial evidence of age discrimination. The defendant argues that "the only evidence to support Mr. Muth's claim is his own conclusory-worded affidavit and attached job posting for job call 'OSHA/EPA Safety Coordinator.' " The defendant offers in opposition to the plaintiffs' claim the deposition testimony of Russell Lavigini, who testified that after Muth's discharge, his responsibilities were taken over by Bill Kollar, Mr. Muth's supervisor. Kollar died unexpectedly and his job duties, including those that were formerly Muth's, were distributed among existing employees. Deposition of Russell Lavigini, pp. 30-32; 34-37. The plaintiffs offer no evidence that disputes the defendant's claim outside of the plaintiffs' conclusory claim.

The plaintiffs next argue that there is "circumstantial evidence in the form of 'preferential treatment of younger employees in the form of job retentions and reassignments is a part of the 'reorganization.' " Defendant argues that not only is the allegation by the plaintiffs a broad unsupported allegation, the facts establish that ten of the

terminated employees were younger than age forty and fifteen of the terminated employees were younger than that of the plaintiffs. The plaintiffs' claim regarding preferential treatment is simply a conclusory statement unsupported by the facts. "[M]ere conclusory allegations do not suffice to prove intentional discrimination based on age." *Simpson*, 823 F.2d at 941 (citing *Locke v. Commercial Union Ins. Co.*, 676 F.2d 205, 206 (6th Cir. 1982); *Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66, 70 (6th Cir. 1982)).

The plaintiffs next argue that the defendant's "eleventh hour" reversal of its liberal bumping policy is circumstantial evidence of age discrimination. According to the plaintiffs, the defendant maintained a bumping policy wherein seniority rights permitted more senior employees to "bump," more junior employees during lay-off periods. In support of their claim that a "bumping policy" existed, the plaintiffs have supplied the Court with Plaintiffs' Exhibit 5. The document itself is a two-page document that is apparently related to lay-off procedure of salaried employees. The document has a revision date posted as 6-13-86. The plaintiffs' exhibit is not referenced to any testimonial or affidavit explanation and stands alone.

The defendant claims that no such bumping policy existed in the research division. Defendant offers the deposition testimony of Russell Lavigini who denies the existence of such bumping policy. Moreover, the defendant correctly points out that Plaintiffs' Exhibit 5 of the Plaintiffs' Brief is unsupported or identified by any deposition

testimony or affidavit and for that a reason alone should be disregarded. The Court agrees with the defendant in the sense that absolutely no explanation by way of testimony or affidavit has been offered as Plaintiffs' Exhibit 5. The document alone does not establish discriminatory conduct on the basis of age. The plaintiffs have failed to offer any probative deposition testimony or affidavit testimony that raises a material issue of fact that such a bumping policy existed either formally or informally within the research division.

The defendant next argues that the defendant's 1987 work force reduction guidelines are circumstantial evidence of discrimination. The plaintiffs have supplied the Court with Plaintiffs' Exhibit 4 which purports to be the second page of a two page document. The focal point of the document, according to the plaintiffs, is a statement which appears under the heading "Application Principles." The statement is prefaced with "Application of Uniform Guidelines must conform with the following:" and reads "Documentation of decision-making process must avoid biased statements or references to employee gender, race, sex, or age." The defendant has come forward with the complete document attached to its reply brief. The first page is titled "Application of Uniform Guidelines During Workforce Reduction." The balance of the two pages are organized in outline form under the headings of introduction, selection process, application of principles, and review.

The Court has reviewed the complete document and finds that the quoted language provided by the

plaintiffs is not probative evidence of discriminatory conduct. The overall document reflects an effort by GenCorp to reduce its employment personnel on a fair and consistent manner. The document outlines the purpose and goals of the work reduction process. It explains the factors that should be considered in evaluating employees and establishes the criteria to be used. The document also addresses the proper procedure to be employed when examining subjective criteria. All these items are covered on page one of the document, the page left out by the plaintiffs. Moreover, on page two under the same heading of the quoted language by the plaintiffs, the document calls for the documentation of the decision making process, the avoidance of age as a factor, the avoidance of undocumented after the fact criticisms, and a requirement that the employee's supervisor should be consulted.

It is clear to the Court that plaintiffs' Exhibit 4 is not probative evidence of discrimination. Not only is the document presented out of context, there is, again, no testimony or affidavit evidence that refers to or explains the document.

In sum, the Court finds that the "considerable circumstantial evidence," as claimed by the plaintiffs fails to establish an inference of age discrimination.

The plaintiffs raise two additional arguments that the Court finds need to be addressed. First, the plaintiffs argue in the case of each individual plaintiff that they were qualified for the position and that because they were qualified their discharge is evidence of pretext. However, the defendant does not dispute that the plaintiffs were qualified for their

positions. Instead, the defendants have articulated nondiscriminatory reasons in each individual plaintiffs' factual situation.

The plaintiffs also argue that, in many of the plaintiffs' individual cases, that they were not offered other positions with the defendant. However, "[w]hen an employer reduces its work force for economic reasons, it incurs no duty to transfer the employee to another position within the company." *Simpson*, 823 F.2d at 942, n. 6 (citing *Ridenour v. Lawson Co.*, 791 F.2d 52, 57 (6th Cir. 1986)).

V. CONCLUSION.

The plaintiffs' claims of age discrimination have been challenged by the defendant's motion for summary judgment. The plaintiffs, therefore, are under an obligation to come forward with probative evidence that establish material issues of fact to avoid summary judgment.

The plaintiffs argue that the statistical evidence along with the circumstantial evidence presented raise material issues of fact which preclude the granting of defendant's motion for summary judgment on the plaintiffs' age discrimination claims. The Court disagrees. The plaintiffs' entire evidence of age discrimination is two fold: (1) the statistical report of Mr. Rosen; and (2) various pieces of circumstantial evidence. The plaintiffs' evidence, taken together, simply fails to establish a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 249. Furthermore, the evidence does not raise an inference of discrimination and therefore the plaintiffs have failed to raise a material issue of fact

as to a *prima facie* case of age discrimination. Summary judgment is appropriate where the non-moving party, in this case, fails to make a sufficient showing an element of its case, i.e., a *prima facie* claim of age discrimination. *Celotex Corp.*, 477 U.S. at 323.

Even if the Court were to find the plaintiffs' evidence sufficient to establish a *prima facie* case, the plaintiffs would be no better off. The defendant has demonstrated, without dispute, a legitimate non-discriminatory reason for the plaintiffs' terminations, i.e., corporate reorganization. Furthermore, the plaintiffs' evidence does not raise an issue of fact on the issue of pretext, an issue for which they have the burden.[3]

Outside of the plaintiffs' statistical evidence and the circumstantial evidence claimed by the plaintiffs, the plaintiffs have provided the Court with no other evidence of discrimination except for the fact that the plaintiffs are over age forty and were terminated. If the Court were to deny the defendant's motion for summary judgment, "then every employer who terminates an employee between forty and seventy years of age under any circumstances, will carry an automatic burden to justify the termination." *Shadi*

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[3] In the plaintiffs' brief in opposition to the motion for summary judgment, the plaintiffs conclude each discussion regarding the facts surrounding each individual plaintiff with the statement that the defendants stated reasons for termination are mere pretext. *See* pp. 4, 8-9. However, they offer no evidence in support of those claims. The statements are merely conclusions unsupported by argument or facts.

v. Reynolds Chemical, 636 F.2d 116, 118 (6th Cir. 1980).

In *Simpson*, the Sixth Circuit Court of Appeals stated that "[i]n *Laugesen* we adopted a case-by-case approach, one that would allow us to remain attentive to the realities of the business world," in addressing age discrimination claims. *Simpson*, 823 F.2d at 940-41. In this case, it is undisputed that the defendant's corporate reorganization was prompted by GenCorp's effort to avoid a hostile takeover. Such a practice is a common response in today's modern day business world where corporations are exchanged in the market of hostile takeovers. *See, O'Neal v. Burger Chef Systems*, Nos. 88-3284/3318, slip. op. at 20 (6th Cir. Nov. 1, 1988) ("This is the era of mergers and acquisitions, and corporations are regularly bought, sold, or otherwise subjected to abrupt changes in ownership." *Id.*)[4]

The standard for summary judgment "mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict." *Anderson*, 477 U.S. at 250. Here, the Court finds that the evidence presented in opposition to the defendant's motion for summary judgment leads the Court to but one reasonable conclusion and that is to judgment in favor of the defendant. The evidence and facts submitted by the plaintiffs do not provide a sufficient basis for

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[4] To be reported at 860 F.2d 1341.

allowing this case to proceed to a jury trial. "One of the principle purposes summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. . . ." *Celotex*, 477 U.S. at 323-24. The Court finds that summary judgment shall be entered in favor of the defendant.

Accordingly, and for the reasons that appear above, the Court finds that the defendant's motion for summary judgment on the plaintiffs' federal and state age discrimination claim is granted.

Furthermore, because the Court finds in favor of the defendant on the plaintiffs' federal claim, the ADEA claim, the Court finds it unnecessary to address the pendent claims of negligent infliction of emotional distress, and breach of an implied contract. *See, United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). The state pendent claims are, therefore, dismissed without prejudice.

IT IS SO ORDERED.

/s/ David D. Dowd, Jr.
U.S. District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THEOPHILOS A. MILLIS (C88-0941A), RICHARD S. NOVITSKY (C88-0942A), MILAN A. ROLIK (C88-1688A), NORMAN S. TROMMER (C88-0937A),
Plaintiffs,

vs.

DIVERSITECH GENERAL, INC.,
Defendant.

MEMORANDUM OPINION

DOWD, J. January 27, 1989

I. INTRODUCTION.

The above-captioned cases are brought by the plaintiffs against the defendant, DiversiTech General, Inc. ("DiversiTech"), as a result of the defendant's reorganization and the subsequent discharge of the plaintiffs. The plaintiffs' claims are based upon the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* The plaintiffs have also brought state pendent claims alleging violation of Ohio Revised Code § 4101.17, negligent infliction of emotional distress, and breach of an implied contract.[1] The

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[1] In the plaintiffs' complaint they also allege breach of an express contract. The plaintiffs now represent that they wish to withdraw that claim. Accordingly, the cause of action asserted in the complaint for breach of the express contract is dismissed.

defendant has moved for summary judgment on the plaintiffs' claims and the plaintiffs have opposed the motion.[2]

The above-captioned four cases have been consolidated for trial. The four cases represent four out of seven cases filed against DiversiTech alleging the same claims. The remaining three cases have been stayed pending the resolution of motions for transfer and further order of the Court.

II. BACKGROUND.

The background facts surrounding the defendants' restructuring facts are relatively simple and undisputed. In 1987, GenCorp, Inc., DiversiTech's parent corporation, underwent a substantial reorganization in an attempt to defend an unsolicited tender offer. GenCorp's defense was financed by the sale of two of its largest subsidiaries General Tire, Inc. and RKO Bottling. The DiversiTech subsidiaries was reduced in size but eliminated.

As a part of the reduction, the management and DiversiTech adopted a number of cost-cutting measures which included a hiring freeze, suspension

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[2] The claims alleged here are similar to the claims raised by the plaintiffs in a group of age discrimination cases filed against GenCorp, Inc. *See, e.g., Barnes v. GenCorp, Inc.*, C88-1689A. The Court sustained GenCorp's motion for summary judgment in those cases and the Court set out its basis for its decision in a memorandum opinion. The Court's memorandum opinion can be found in C88-1689A at docket #42. The Court will make reference to its opinion in that case again in this opinion and refer to it simply as *Barnes v. GenCorp.*

of training seminars, a twenty-five percent reduction in travel expenses, a fifty percent reduction in overtime, the termination of all temporary help, and the reduction of the salaried payroll. As a part of the reduction in the salary payroll, DiversiTech examined positions throughout the company to determine which positions could be eliminated while causing a minimal disruption to overall production. As a result of the job examinations, job functions were split and consolidated with other positions and in some instances, job functions were simply abolished.

Against the backdrop of the overall corporate reorganization, the specific facts surrounding the discharge of each of the four plaintiffs will be discussed below.

A. Theophilos A. Millis.

Theophilos A. Millis was employed as a Chief Chemist at DiversiTech and was sixty-two years old (Date of Birth ("DOB") 8-9-24) at the time of his discharge in April of 1987. Mr. Millis reported to the Latex Manufacturing Manager, H. E. Jewett, at the Mogadore, Ohio plant. Mr. Millis' duties included the testing of raw materials and new chemicals used in the DiversiTech manufacturing processes.

According to the defendant, Mr. Millis' position was eliminated and the majority of his testing duties were delegated to outside sources and his administrative duties were assumed by his subordinate, G. E. Miller, (DOB 9-23-30), a Quality Chemist. Mr. Miller was responsible for "in-process testing" and his

duties continued after the restructuring and subsequent reduction.

The defendant asserts that the testing program at the Mogadore, Ohio plant focused on a "single-sourcing" program and improved quality control at vendor facilities. The single sourcing program was significantly reduced and consequently, the testing at the Mogadore plant was no longer needed.

The plaintiff, however, claims that there was no such policy of a "single sourcing" program at the Mogadore plant and in support relies on the deposition testimony of Howard Wheeler, Jr., President of the Polymers Division. The plaintiffs also rely on Mr. Wheeler's deposition testimony for the proposition that the testing done by Mr. Millis was not discontinued. Consequently, the plaintiffs argue that the asserted reasons for elimination of Mr. Millis' position is pretext for discriminatorily motivated conduct. The plaintiffs further argue that Mr. Millis had thirty-one years of service with the defendant, had held a wide variety of positions with the company, and was therefore qualified to assume the position of his subordinate.

In the defendant's reply brief, the defendant argues that the plaintiffs reliance on the deposition testimony of Howard Wheeler is misplaced. The defendant argues that the decision to terminate Mr. Millis was made by the plant manager, Harland Jewett, and his deposition testimony is consistent with the reasons articulated by DiversiTech for the elimination of Millis' position.

B. Richard S. Novitsky.

Richard S. Novitsky was employed as Manager of Ecology and Governmental Compliance and was fifty-six years old (DOB 10-4-30) at the time of his discharge. Mr. Novitsky reported to the Latex Manufacturing Manager, H. E. Jewett.

DiversiTech asserts that many of the functions performed by Mr. Novitsky were redundant and partially performed in other positions. According to DiversiTech, Mr. Novitsky's duties were divided among four persons and positions after his discharge: L. E. Gulka, Personnel Administration, OSHA/EEO; T. C. Stokes, Safety Inspector; R. A. Newgent, Senior Process Engineer; and his supervisor, H. E. Jewett, Latex Manufacturer Manager.

The plaintiff argues that the asserted reasons for the discharge of Millis are a pretext for conduct motivated by age. First, the plaintiff argues that the deposition testimony of Mr. Wheeler establishes that Mr. Novitsky's work was neither redundant or partially performed in other positions. Second, Mr. Jewett's deposition testimony, according to the plaintiff, reveals that he does not recall assuming any specific duties of Mr. Novitsky's. Third, the plaintiff argues that Gulka, Newgent, and Jewett are younger than Mr. Novitsky. Further, plaintiff claims Stokes was a non-technical employee who required technical direction to perform environmental work and yet he was retained over Mr. Novitsky.

C. Milan A. Rolik.

Milan A. Rolik was employed as a Senior Chemist in the analytical lab and was sixty years old (DOB 6-16-26) at the time of his termination. Mr. Rolik reported to the Laboratory Manager, F. M. Mong.

Mr. Rolik was assigned as a Senior Chemist in September of 1985. Mr. Rolik's 1985 performance review reflected a determination by DiversiTech that he possessed basic deficiency in analytical chemistry. According to DiversiTech, therefore, Mr. Rolik's functions as a Senior Chemist involved primarily "developmental/training duties in microscopy work."

DiversiTech claims that the senior chemist position was eliminated because the basic skills required of the position could be easily assumed by other lab employees. Mr. Rolik's duties were assumed by other lab employees. Mr. Rolik's duties were assumed by the Laboratory Manager, Mr. Mong and two Senior Analytical Chemists, Mr. Shringarpurey (DOB 6-6-38) and B. A. Schreiner (DOB 1-5-49).

The plaintiff argues that Mr. Rolik was subjected to a number of adverse employment decisions. The plaintiff argues that in 1984 Mr. Rolik's position as Pilot Plant Manager was eliminated and there was no available alternate position for him. As a result, Mr. Rolik filed an age discrimination charge with the Equal Employment Opportunity Commission. Thereafter, Mr. Rolik received temporary assignments until September of 1985 when he was transferred to the Analytical Group. The plaintiff argues

that many of the temporary assignments were dirty and dangerous jobs and moreover that he did not request a transfer to the analytical group.

At the time of his transfer to the Analytical Group, the plaintiff Rolik claims that he was told that his salary was to be reduced from $25,000 per annum to $20,000 per annum. At some point, however, DiversiTech agreed to retain Rolik's salary at its $25,000 level. The plaintiff attributes this alleged change of course to letters he wrote to various DiversiTech management personnel when his salary reduction was contemplated. The plaintiff argues that "his letter to Mr. Wheeler raised the specter of age discrimination. The company changed its position and decided to retain him at his current salary." Plaintiff's Brief in Opposition at p. 9.

Upon his arrival in the analytical group in October of 1985, Mr. Rolik received an employee performance report in December of 1985 just three months after starting with the group. Mr. Rolik asserts that such a practice is unusual and that normally performance reviews are given on a yearly basis. Moreover, plaintiff Rolik argues that he had only performed his assigned tasks in the analytical group for less than two weeks prior to being given his performance review.

In sum, Rolik claims that in view of the history that plaintiff Rolik has had with DiversiTech, the plaintiff argues that the company's asserted reason of poor performance in the analytical group as a basis for his elimination of his position is mere pretext for discriminatorily motivated conduct.

D. Norman S. Trommer.

Mr. Trommer was employed as a senior Process Engineer and was sixty-one years old (DOB 7-25-25) at the time of his termination. Mr. Trommer reported to the Chief Process Engineer, M. J. Weiss, along with two other Senior Process Engineers, V. A. Ferone (DOB 7-17-32) and R. A. Newgent (DOB 10-23-35). DiversiTech claims that Mr. Trommer was functionally responsible for DiversiTech's textile markets, i.e., carpeting. Mr. Ferone was functionally responsible for the paper/latex markets and Mr. Newgent was functionally responsible for the tire cord adhesive/new product markets.

DiversiTech asserts that the paper/latex markets were the largest segments of product lines served by the three senior process engineers, Trommer, Ferone, and Newgent. DiversiTech claims that the tire cord adhesive/new products market consisted of one mature product line and one growing product line. On the other hand, DiversiTech claims that the textile market, the area served by Trommer, consisted of mature markets that were "in a state of declining sales, profit margin and emphasis." Defendant's Brief in Support of Summary Judgment at p. 6. DiversiTech claims that because of the declining sales, profit margin, and emphasis, it decided to withdraw from the textile markets. Accordingly, Trommer's position was eliminated. DiversiTech claims that any remaining service to the textile markets at DiversiTech was assumed by his supervisor, M. J. Weiss.

Plaintiff argues that Mr. Trommer was the oldest of the three Senior Process Engineers with the most senior years of service and was the only one eliminated. Moreover, the plaintiffs claim that the deposition testimony of Mr. Wheeler reflects that no decision had been made at DiversiTech to withdraw from textile markets. Similarly, Mr. Wheeler testified, according to the plaintiffs, that the textile markets remained a significant portion of the company's business. Moreover, the plaintiffs argue that the position of Senior Process Engineer was posted after Mr. Trommer's job was eliminated.

In the defendant's reply brief, the defendant claims that the reliance on Mr. Wheeler's deposition testimony is misplaced because Mr. Wheeler was not Mr. Trommer's supervisor. DiversiTech instead relies upon the deposition testimony of Mr. Trommer's supervisor, M. J. Weiss, and the assertion that his testimony is consistent with the reasons asserted by the defendant in its answers to interrogatories.[3]

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[3] Defendant, in fact, cites to the following question and answer:

> Q. Did their come a point after April of 1987 where there was a change in the output at the Mogadore plant?
>
> A. Yes. I was told that we were de-emphasizing textile latex because of the market conditions. We indeed reduced the manufacturing of that product line. I don't have the exact figures, but it was in the range of one-third to one-fourth the volume and about a six to eight-month span.

III. SUMMARY JUDGMENT STANDARD.

It is well established that when considering a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, "the inferences to be drawn from the underlying facts contained in [affidavits, pleadings, depositions, answers to interrogatories, and admissions] must be viewed in the light most favorable to the party opposing the motion." *U.S. v. Diebold*, 369 U.S. 654, 655 (1962); *United States v. Hodges X-Ray, Inc.*, 759 F.2d 557 (6th Cir. 1985); *Tee-Pak, Inc. v. St. Regis Paper Co.*, 491 F.2d 1193 (6th Cir. 1974); *Bohn Aluminum& Brass Corp. v. Storm King Corp.*, 303 F.2d 425 (6th Cir. 1962). However, the non-moving party bears the responsibility to demonstrate that summary judgment is inappropriate under Rule 56(e). The "adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or otherwise . . . , must set forth specific facts showing there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." Fed. R. Civ. P. 56(e).

A court may grant summary judgment only if there are no issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "[T]he judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is

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Defendant's Reply Brief at p. 6 (citing the Deposition of M. J. Weiss at pp. 44-45).

a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "[T]here is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." *Id.* (citing *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970); *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 258 (1968)). Therefore, "[i]f the evidence is merely colorable, . . . , or not significantly probative, summary judgment may be granted. *Id.* (citing, *Dombrowski v. Eastland*, 387 U.S. 82 (1967); *Cities Service*). Moreover, summary judgment is appropriate when the non-moving party "has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

In sum, "[t]he inquiry performed is the threshold inquiry of determining whether there is the need for a trial — whether, in other words, there are any genuine issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson*, 477 U.S. at 250.

IV. ANALYSIS.

The basic elements of proof in age discrimination actions are settled. *See, Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Ridenour v. Lawson Co.*, 791 F.2d 52 (6th Cir. 1986); *Blackwell v. Sun Electric Co.*, 696 F.2d 1176 (6th Cir. 1983).

Initially, the plaintiffs bear the burden of coming forth with evidence that establishes a *prima facie*

showing of discrimination. The Sixth Circuit has defined the plaintiffs' initial burden as producing enough evidence to shift the burden of production, as compared to the burden of persuasion, to the defendant. *Ridenour*, 791 F.2d at 55 (citing *Halsell v. Kimberly-Clark Corp.*, 683 F.2d 285 (8th Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983)). Once that *prima facie* showing is made, the defendant has the obligation of coming forward and articulating some legitimate nondiscriminatory reason for its actions. *Burdine*, 450 U.S. at 254. If the defendant meets this obligation, the plaintiffs then must persuade the trier of fact that the articulated reason was a mere pretext for discriminatorily motivated action. *Burdine*, 450 U.S. at 255-56; *Ridenour*, 791 F.2d at 56. Despite the shifting burdens of production, the "burden of persuasion rests upon the plaintiff throughout the proceedings. . . ." *Ridenour*, 791 F.2d at 56 (citing, *Burdine*, 450 U.S. at 256).

On a summary judgment motion the required elements of proof under Title VII are "telescoped." *McKenzie v. Sawyer*, 683 F.2d 62, 71 (D.C. Cir. 1982). "The undisputed evidence in the record . . . should both raise the inference of discrimination and foreclose the possibility that [the defendant] could offer non-pretextual reasons for the challenged practice [ ]." *McKenzie*, 684 F.2d at 71.

Typically, a plaintiff can prove a *prima facie* case if the four factors of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) are established.[4] Under the

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[4] The parties agree that the elements of proof under O.R.C. § 4101.17, the Ohio state statute prohibiting age discrimination, is

McDonnell Douglas Corp. criteria, the plaintiff may establish a *prima facie* case when he or she demonstrates that: (1) he or she is a member of the protected class; (2) he or she was subjected to an adverse employment action; (3) he or she was qualified for the position; and (4) he or she was replaced by a younger person. *McDonnell Douglas Corp.*, 411 U.S. at 802; *Simpson v. Midland-Ross Corp.*, 823 F.2d 937, 940 (6th Cir. 1987) (citing *Wilkins v. Eaton Corp.*, 790 F.2d 515, 520 (6th Cir. 1986)). The *McDonnell Douglas* criteria is not the sole method of proof and "[a] plaintiff may also show through circumstantial, statistical, or direct evidence that he has been discriminated against." *Simpson*, 823 F.2d at 940 (citing *Blackwell v. Sun Electric Corp.*, 696 F.2d 1176, 1180 (6th Cir. 1983). Moreover, the Sixth Circuit Court of Appeals has refused to mechanically apply the *McDonnell Douglas* factors to age discrimination cases and instead has adopted an approach of a case by case analysis. *Blackwell v. Sun Elec. Corp.*, 696 F.2d 1176, 1179 (6th Cir. 1983); *Laugeson v. Anaconda Co.*, 510 F.2d 307, 312 (6th Cir. 1975).

Proof of the plaintiff's *prima facie* case is complicated in the context of a reduction in force discharge case. "[A]n ADEA plaintiff who has been terminated amidst a corporate reorganization carries

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the same as the federal standards. *See, Barber v. Scovill, Inc.*, 6 Ohio St. 3d 146 (1983); *Merkel v. Scovill, Inc.*, 787 F.2d 174, 178-79 (6th Cir. 1986); *McLaurin v. Fischer*, 768 F.2d 98, 105 (6th Cir. 1985). Accordingly, the Court will not differentiate between the state and federal age claims throughout the opinion, however the resolution of both is to be presumed.

a greater burden of supporting charges or discrimination than an employee who was not terminated for similar reasons." *Ridenour v. Lawson Co.*, 791 F.2d 52, 57 (6th Cir. 1986). "The plaintiff in such reorganization cases must come forward with additional direct, circumstantial, or statistical evidence that age was a factor in his termination in order to establish a *prima facie* case." *LaGrant v. Gulf & Western Mfg. Co., Inc.*, 748 F.2d 1087, 1091 (6th Cir. 1984) (citing *Williams v. General Motors Corp.*, 656 F.2d 120 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982)). *See, also, Simpson v. Midland-Ross Corp., supra.*

In this case, the defendant argues that the plaintiffs cannot establish a *prima facie* case under the four factors enunciated in *McDonnell Douglas* in the context of a reduction in force situation because the plaintiffs were never replaced by younger employees. Further, the defendant argues that the plaintiffs have not come forward with any direct, circumstantial, or statistical evidence that would establish that age was a determining factor in the defendant's decision to terminate plaintiffs. Moreover, the defendant argues that even if the plaintiffs can establish a *prima facie* case of age discrimination, the defendant has articulated a nondiscriminatory reason for its decision, i.e., corporate reorganization due to economic necessity. Further, the defendant argues that there is absolutely no evidence in the record that would establish that the defendants' articulated reason was a pretext for discriminatory conduct.

In opposition to the defendant's motion the plaintiff's rely on statistical evidence and circumstantial evidence. The statistical evidence is a report from Harvey S. Rosen along with Mr. Rosen's affidavit. The plaintiffs argue that the following circumstantial evidence raise material issues of fact precluding summary judgment.

> (a) the inconsistent "reasons" advanced by Defendant for Plaintiffs' terminations; (b) the Defendant's posting of a job opening to fill Mr. Trommer's position; (c) Defendant's mysterious termination of a 63-year-old sales manager without the knowledge of the Polymers Division president to whom he reported; (d) at least one other instance in which a supervisor was not consulted about the termination of a subordinate in his 60's (Plaintiff Trommer); (e) Defendant's eleventh-hour reversal of its liberal bumping practice; (f) the absence of guidelines or other efforts by Defendant to prevent age discrimination, together with specific mandated percentages for payroll-cutting; (g) preparation and review of age-group/salary charts by the personnel manager during the termination decision-making period; (h) a supervisor's admission that a 62-year-old's rumored retirement plans played a part in the decision to eliminate his position.

Plaintiff's Brief in Opposition, pp. 17-18.

The Court begins with an examination of the plaintiff's statistical evidence offered through the expert opinion of Dr. Rosen.

The plaintiff argues that "[t]he statistical evidence presented by each of the four Plaintiffs, bearing standard deviations greater than four, convincingly indicates that older employees were disproportionately impacted by defendant's termination decisions and were selected for discharge on the basis of age." Plaintiff's Brief in Opposition at p. 15. Mr. Rosen's report provides in pertinent part:

> An analysis was conducted of 165 employees, the entire work force of the Polymers Division immediately prior to the April, 1987 terminations, excluding the Odessa, Texas plant, which was transferred out of the Division. Thirteen of the Division's 165 employees were terminated on or about April 30, 1987, including 10 of the 35 employees of age 55 or older and 7 of the 10 employees of age 60 or older.
>
> Another analysis was conducted of only the 109 employees who worked in departments affected (reduced) by the April 1987 terminations. Thirteen of those 109 employees were terminated, including 10 of the 24 employees of age 55 or older, and 7 of the 8 employees of age 60 or older.
>
> * * *
>
> The age-55-or-older groupings, per populations of 165 and 109, had actual terminations deviating 4.544 and 4.495 standard deviations, respectively, from the expected number of terminations, indicating probabilities of 100 and 99.95 percent respectively, that the

terminations in those groups cannot be explained in terms of age neutral criteria.

The age-60-or-older groupings, per populations of 165 and 109, had actual terminations deviating 7.292 and 6.595 standard deviations, respectively, from the expected number of terminations, indicating a 100 percent probability, in each instance, that the terminations in that group cannot be explained in terms of age-neutral criteria.

Plaintiffs' Exhibit 4, Letter of Harvey S. Rosen, pp. 1-3.

The Court is again faced with the same problem that was faced in relation to the seven cases consolidated for trial against the defendant GenCorp, *i.e., Barnes v. GenCorp.* The statistics offered by the plaintiff are presented in a vacuum. There is no deposition testimony to support the report of Mr. Rosen and there is no discussion in his report or his accompanying affidavit of the process by which he determined that the relevant age groups were fifty-five and older and sixty and older. Moreover, the Court is unclear as to the reason behind separating the statistics in those groups and referring them to the number of terminations per the number of employees in that group, as opposed to the number of terminations per all age groups. Simply stated, the Court has no basis for which to place the statistics into the context of the facts of the four plaintiffs' discharge.

In the Court's resolution of the motion for summary judgment in the *Barnes v. GenCorp, Inc.*, cases, the Court discussed at length the Sixth Circuit's

decision in *Simpson v. Midland-Ross Corp.*, 823 F.2d 937 (6th Cir. 1987). These cases present no different issue in terms of statistical evidence presented and *Simpson* has a similar application. As the Court stated earlier

> the plaintiffs have not explained the significance of the statistical analysis, nor offered any explanation of the methodology. Rather, the plaintiffs have offered the Court a report of the expert for the Court's own review and presumably its own conclusion. The statistics stand alone and offer no probative evidence of discrimination.

Here again the Court finds that the statistical evidence in this case simply does not provide probative evidence of the issue of age discrimination. The Court turns now to an examination of the circumstantial evidence offered by the plaintiff in opposition to the defendant's motion for summary judgment.[5]

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[5] Despite the plaintiffs' discussion of the facts surrounding each individual plaintiff's discharge, the plaintiffs' claims and the arguments advanced in opposition to the motion for summary judgment are based on broad allegations of age discrimination and not fact specific age discrimination claims. The plaintiffs' claims, in the Court's view, are based upon the collective facts which taken together allegedly establish evidence of a corporate decision to terminate individuals based upon their age. The plaintiffs do not assert that the facts surrounding any one plaintiff establish age discrimination. For example, there is no claim to the Court that in the event summary judgment is appropriate in the case of three of the plaintiffs it is not warranted in the case of plaintiff number four.

First the plaintiffs argue that inconsistent reasons are advanced by the defendant for the plaintiffs' job terminations and therefore the reasons asserted by the defendant are pretext. The defendant Diversi-Tech does not dispute that inconsistent reasons are advanced for each plaintiff's termination. In fact, the defendant admits that an independent examination of each job was conducted to determine which positions could be eliminated with the least obtrusive effect on that business operation. Consequently it is undisputed that the defendant relied on inconsistent reasons for the termination of each individual plaintiff. However, such a fact alone does not establish evidence of age discrimination. The plaintiff has offered no evidence that the different reasons advanced are because age was a factor in the decision. Rather, the plaintiffs offer the inconsistent reasons as evidence of the underlying claim that there was age discrimination. In essence, the plaintiffs have failed to establish any causal connection between inconsistent reasons and an underlying motivating factor to discriminate against the individual plaintiffs on the basis of age. Accordingly, the Court finds that the plaintiffs' claim of inconsistent reasons fails to raise a triable issue of fact on the issue of age discrimination.

The plaintiffs next argue that the defendant's posting of a job opening to fill Mr. Trommer's position is evidence of age discrimination. While the plaintiffs have asserted such a fact, the plaintiffs have failed to establish the posting of Mr. Trommer's job position with any factual support. The plaintiffs cite the Court, on page eleven of its Brief in Opposition, to Exhibit 3 at p. 66, for support of the

proposition that "it is not surprising that a job was subsequently posted for another Senior Process Engineer." The Court has reviewed Plaintiffs' Exhibit 3 at p. 66 and finds no reference of the Senior Process Engineer job position nor any reference to posted available positions for the Senior Process Engineer. Rather, the Court found on p. 66 of Exhibit 3 a one-page excerpt from what appears to be the deposition of Michael Weiss. Moreover, the subject matter on that page seems to be directed at Mr. Novitsky. In sum, the Court finds that there is no evidence presented to the Court on the issue of whether the job position of Mr. Trommer was posted.

The plaintiff next relies on "the mysterious termination of a 63-year-old sales manager without the knowledge of the Polymers Division president to whom he reported" as evidence of age discrimination. Plaintiff argues that

> Mr. Wheeler, President of the Polymers Division, testified that Edward Deckel, 63-year-old Sales Manager, was summarily dismissed from DiversiTech at the beginning of the decision-making process for the reductions-in-force. Even though Deckel reported directly to Wheeler, Wheeler was not consulted about Deckel's departure, and had no knowledge why he was terminated or by whom. (*See* Deposition of Howard Wheeler, Jr. at 29-32, attached as Exhibit 7.) This is probative evidence of discriminatory conduct by top management of DiversiTech. (Deckel subse-

quently filed an age discrimination charge.) (*See* Exhibit 7, at 78.)

Plaintiffs' Brief in Opposition at p. 5. While it may be true that Mr. Deckel was terminated from the employee of DiversiTech without his supervisor's knowledge, the Court fails to see how that blanket assertion is evidence of age discrimination. Once again, the Court has reviewed the cited authority deposition testimony by the plaintiff and finds that it merely supports the fact that Mr. Wheeler was the supervisor of Edward Deckel. There is no support that Mr. Deckel was terminated because of top management's decision to terminate employees on the basis of their age.

The plaintiff next argues that the fact that plaintiff Trommer's supervisor was not consulted about the termination of his subordinate is evidence of age discrimination. The Court finds that the fact that the plaintiff Trommer's supervisor was not consulted before his termination is not in and of itself evidence of age discrimination.

The plaintiff next argues that the defendant's reversal of liberal bumping practice is evidence of age discrimination. Plaintiffs argue that the defendant had a policy of allowing seniority to be used to bump into other positions when positions were eliminated. The plaintiffs argue that this policy was eliminated prior to the reduction in force decision-making process and that decision is reflective of age discrimination. The defendant denies the existence of a bumping policy and argues that even assuming such bumping policy existed, no one and that includes people under age forty, was allowed to use a

bumping policy during the reduction in force period. Simply stated, the defendant argues that the plaintiffs cannot show any discrimination on the part of the defendant by the elimination of a bumping policy because it was applied even handedly to those in the protected age group and those outside of the protected age group.

The Court agrees with the defendant and finds that the decision to terminate the informal bumping policy within the company, viewing the facts in a light most favorable to the plaintiffs, during the reduction in force period is not probative evidence of age discrimination because there is no evidence that the alleged termination of that policy was motivated by age discrimination or used as a means to discriminate against those in the protected class.

The plaintiffs' argument that the absence of guidelines or other efforts by the defendant to prevent age discrimination, together with specific mandates presented for payroll cutting is evidence of age discrimination is dismissed summarily by the Court. The plaintiff has made the blanket claim that this is in fact evidence of discrimination and has offered no support for such a claim.

The plaintiffs next argue that the preparation review of age-group/salary charts by the personnel manager during the termination of decision-making period is evidence of age discrimination. However, the Court has reviewed the deposition testimony of Mr. Weiss and concludes that while Mr. Weiss did do a review of the impact on age forty and over and a racial impact study, there is no evidence that the age

group factors were a part of the decision-making process.

The plaintiffs next argue that "a supervisor's admission that a 62-year-old's rumored retirement plans played a part in the decision to eliminate his position" is made without any cite to the relevant context of that fact. Simply stated, the Court is unable to find the factual basis for such a claim by the plaintiff.

In sum, the Court finds that no reasonable juror could find, based upon the circumstantial evidence presented to the Court that age was a determining factor in the decision to terminate the plaintiffs. Consequently, the Court finds that the plaintiffs have failed to establish a *prima facie* case in the face of the motion filed by the defendants.

V. CONCLUSION.

In its barest sense, the plaintiffs' opposition to the defendant's motion can be reduced to two items. One, a statistical report and two, conclusory allegations which allegedly establish age discrimination. For the Court to allow this case to proceed to a jury would subject every employer who terminates an employee to a jury trial whenever a plaintiff presents a statistical report and various strands of circumstantial evidence. The Court declines to do such in this case.

The Court finds that the evidence submitted by the plaintiff does not raise an inference of discrimination. Therefore the Court finds that the plaintiffs have failed to raise a material issue of fact

as to the *prima facie* case of age discrimination. Moreover, the Court finds that even assuming the plaintiffs have established a *prima facie* case, the defendant has demonstrated, without dispute, a legitimate non-discriminatory reason for the plaintiffs' terminations overall, i.e., corporate reorganization, and in particular to each plaintiffs' factual scenario. Plaintiffs' evidence does not raise an issue of fact on an issue of pretext.

Accordingly, the Court finds that judgment shall be entered in favor of the defendant and against the plaintiffs federal and state age discrimination claims is granted.[6]

Having found in favor of the defendant on the plaintiffs' federal claim, the ADEA claim, the Court finds it unnecessary to address the pendent claims of negligent infliction of emotional distress, and breach of implied contract. *See, United Mineworkers v. Gibbs*, 383 U.S. 715 (1966). The state pendent claims are, therefore, dismissed without prejudice.

IT IS SO ORDERED.

/s/ David D. Dowd, Jr.
U.S. District Judge

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[6] Many of the issues addressed in this case are similar to the addressed in *Barnes v. GenCorp, Inc.*, C88-1689A. The Court is aware that the plaintiffs are in the process of appealing the *Barnes v. GenCorp* decision and is of the view that an appeal of this case will more than likely follow. It is conceivable that a consolidated appeal of the cases against DiversiTech and GenCorp would be beneficial to the parties and the Circuit Court.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 89–3104 and 89–3193

JON F. BARNES, et al. (89–3104),
RICHARD S. NOVITSKY (89–3193),
Plaintiffs-Appellants,

vs.

GENCORP INC. (89–3104),
DIVERSITECH GENERAL, INC. (89–3193),
Defendants-Appellees.

Before KEITH and KENNEDY, *Circuit Judges,*
and PECK, *Senior Circuit Judge.*

ORDER

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, Clerk

Dated: April 30, 1990

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 89–3104, and 89–3192 to 3195

JON F. BARNES, HOMER L. GIBSON, JEAN Z. GIPSON,
CLARENCE P. KENNEDY, WILLY P. KULHANEK,
NORMAN J. MUTH, FEBO C. SPAGNUOLO,
Plaintiffs-Appellants,

vs.

GENCORP INC.,
Defendant-Appellee.

THEOPHILOS A. MILLIS, RICHARD S. NOVITSKY,
MILAN A. ROLIK, NORMAN S. TROMMER,
Plaintiffs-Appellants,

vs.

DIVERSITECH GENERAL, INC.,
Defendant-Appellee.

Before KEITH and KENNEDY, *Circuit Judges,*
and PECK, *Senior Circuit Judge.*

JUDGMENT

ON APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgments of the said district court in this case be and the same are hereby affirmed in part, reversed in part, and the case is remanded consistent with the opinion.

Each party will bear its own costs on appeal.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, Clerk

Dated: February 22, 1990

No. 90-224

Supreme Court, U.S.
FILED
AUG 27 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1990

JON F. BARNES, HOMER L. GIBSON, JEAN Z. GIPSON, CLARENCE P. KENNEDY, NORMAN J. MUTH, FEBO C. SPAGNUOLO,
Petitioners,

vs.

GENCORP INC.,
Respondent.

RICHARD S. NOVITSKY,
Petitioner,

vs.

DIVERSITECH GENERAL, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

THOMAS H. BARNARD
Counsel of Record
Erieview Tower—20th Floor
1301 East Ninth Street
Cleveland, Ohio 44114-1886
(216) 696-7600
Attorney for Respondents

Of Counsel:
DAVID J. SOMRAK
DUVIN, CAHN & BARNARD
Erieview Tower—20th Floor
1301 East Ninth Street
Cleveland, Ohio 44114-1886
(216) 696-7600

WILLIAM GORENC, JR.
GENCORP INC.
175 Ghent Road
Fairlawn, Ohio 44313
(216) 869-4262

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

STATEMENT PURSUANT TO RULE 29.1

Respondent GenCorp Inc. is a publicly held corporation with no parent corporations. Stock of GenCorp Inc. is traded on the New York Stock Exchange. GenCorp Inc. has the following subsidiaries and affiliates, exclusive of wholly owned subsidiaries:

Metallurgical Industries, Inc., which is publicly held;

GKK Automotive, Inc., Ltd., which is a joint venture with Kurashiki Kako (Mazda).

Respondent DiversiTech General, Inc., now known as "GenCorp Polymer Products," was a wholly owned subsidiary of GenCorp Inc. until December 27, 1988, at which time DiversiTech General, Inc. was merged into GenCorp Inc. Respondent DiversiTech General, Inc. had no subsidiaries other than wholly owned subsidiaries.

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No. 90-224

IN THE

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RICHARD S. NOVITSKY,
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DIVERSITECH GENERAL, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

As they have throughout this litigation, Petitioners ignore the undisputed, individualized facts that led GenCorp and DiversiTech to select them for layoff in an economically mandated reduction-in-force. Instead, they merely rely on broad brush, lifeless statistics—carefully packaged and canted to reach the conclusion they desire. This Court, as did the courts below, must look behind the screen of statistics in order to fully appreciate why summary judgment is appropriate.

Throughout the 1980s American companies and their employees were bedeviled by corporate "raiders." GenCorp's turn came in March, 1987. As a defense to an unsolicited tender offer, GenCorp instituted a massive stock repurchase program at a cost of $1.4 billion. This repurchase program was primarily financed by the sale of two large GenCorp subsidiaries—General Tire, Inc., a tire manufacturer, and RKO Bottling, a soft drink bottler.

GenCorp Research. Prior to the attempted hostile takeover, GenCorp maintained a Research Division in Akron, Ohio where the "GenCorp" Petitioners were employed. The Research Division conducted research in three areas: tire technology; projects associated with GenCorp's automotive and polymer-based products; and exploratory and support research. The Research Division employed 154 persons in a variety of professional, technical, managerial and clerical positions.

With the divestment of General Tire, GenCorp determined that not all existing Research positions could be justified. A smaller company needed a smaller, more focused research laboratory. For instance, since GenCorp was no longer involved in tire manufacturing, there was no longer a need for GenCorp to do tire research.

In deciding which positions to eliminate, each job at the Research Division was examined individually. Those no longer necessary to GenCorp's ongoing business were eliminated, and the incumbent employee was laid off. In all, 38 persons—ranging in age from 22 to 62—were laid off as a result of the restructuring. None of these positions have been recreated or filled since then.

The specific facts surrounding the discharge of each GenCorp Petitioner follows:

1. Jon F. Barnes

Jon F. Barnes [Date of Birth (DOB): 12-23-38] was employed as a non-technical Research Technician in the Polymer Structure Section. His actual duties consisted of laboratory characterization testing of polymers under the general supervision of technical personnel.

Following the divestment of General Tire, management determined that only one non-technical employee was necessary to continue the reduced workload in polymer characterization services. Accordingly, management reviewed the knowledge, skills and abilities of the non-technical employees involved in polymer characterization—Barnes, K.L. Hall [DOB: 4-27-61]; A.J. Kirschner [DOB: 5-2-47] and J.W. Lea [DOB: 9-14-32].

Mr. Lea, then age 54, was selected for the sole remaining non-technical job because his knowledge, skills and abilities were deemed superior to those of both Barnes and Ms. Kirschner. In fact, Mr. Lea held the highest ranking non-technical classification in the lab and he had extensive experience in light of his 33 years

of employment.[1] (It should also be noted that while age was not a factor in the decision to retain Mr. Lea, he was the *oldest* of the four.)

2. Homer L. Gibson

Homer L. Gibson [DOB: 5-26-31] was employed as one of three Research Machinists in the Machine Shop. As a Research Machinist, Gibson provided machine services and support for the activities of the Research scientists. He was also available to assist in plant maintenance, if required.

Following the restructuring, management determined only one Research Machinist was necessary, given the reduction in research activities, with additional duties to be performed as needed by the Department Supervisor, W.W. Miller. Again, management reviewed the knowledge, skills and abilities of the three Research Machinists employed in the Machine Shop—Gibson, R.G. Boyd [DOB: 2-9-33]; and G.E. Dodson [DOB: 11-23-30]—relative to the requirements of the sole remaining position.

Mr. Boyd, then age 54, was selected because his knowledge, skills and abilities were deemed superior to those of Messrs. Gibson and Dodson. Mr. Boyd's performance reviews were consistently higher than those of the other two Research Machinists and he was also considered the best machinist by the Department Supervisor, W.W. Miller.

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[1] Since Mr. Hall was receiving his Bachelor of Science degree in one month, in June, 1987, and would therefore become a technical, as opposed to a non-technical, employee, he was also retained.

3. Jean Z. Gipson

Jean Z. Gipson [DOB: 9-22-29] was one of two library technicians in the Technical Information Center at the Research Division. As a Library Technician, she provided information resources to technical and professional personnel.

Following the restructuring, management determined that the Technical Information Center needed only one Library Technician (rather than two) and that the scope of the Library Technician function would be expanded to include the provision of additional technical services. Accordingly, management reviewed the knowledge, skills and abilities of the two incumbent Library Technicians—Gipson and Ms. Norma K. Smith [DOB: 3-1-36]—relative to the requirements of the remaining position. Management decided to retain Ms. Smith, then age 51, because she possessed a Bachelor of Science degree in chemistry and, prior to holding the job of Library Technician, she had been a chemist for GenCorp. Ms. Gipson, on the other hand, possessed no college degree and her prior experience had been limited to clerical and operative positions.

4. Clarence P. Kennedy

Clarence P. Kennedy [DOB: 4-17-28] was employed as a non-technical Research Assistant to a Group Leader, P.T. Suman, and both were involved with analyzing and synthesizing rubber compounds, primarily for use as tire rubber. Mr. Kennedy's actual duties consisted of performing laboratory testing of rubber compounds under Mr. Suman's supervision.

Following the restructuring, management determined that only one person was required to do the limited amount of rubber compound research which remained following the divestment of General Tire. Accordingly, management reviewed the knowledge, skills and abilities of the two employees involved, Kennedy and his supervisor, P.T. Suman [DOB: 10-8-37].

Mr. Suman, then age 49, was retained because his knowledge, skills and abilities were deemed superior to those of Mr. Kennedy. Mr. Suman possessed a Bachelor of Science degree in chemistry and had performed all technical functions related to the rubber compound research. In contrast, Mr. Kennedy possessed no college degree and his prior experience had been limited to non-technical support.

5. Norman J. Muth

Norman J. Muth [DOB: 2-13-31] was employed as Supervisor for Research Center Services. He supervised four clerical employees and had operational responsibility for the clerical and mechanical storeroom; shipping and receiving; and mail, custodial, lawn and waste services. He reported to W.L. Kollar, formerly Manager, Research Center Administration.

Following the restructuring, management determined that Mr. Muth's staff of four clerical employees would be reduced to two, who would report directly to the Manager for Research Center Administration. Mr. Muth's position therefore became redundant once no other staff members reported to him.

6. Febo C. Spagnuolo

Febo C. Spagnuolo [DOB: 11-23-28] was employed as a non-professional Laboratory Supervisor in the physical testing area. As such, he was directly responsible for the physical testing of tires and various other rubber products.

Following the restructuring, management determined that an intermediate level of supervision in the physical testing lab could not be justified in view of the limited amount of physical testing which would remain following the divestment of General Tire. Accordingly, management eliminated the position of Laboratory Supervisor, held by Mr. Spagnuolo, as well as four non-technical Research Assistant positions, all of which were in the Polymer Physics and Physical Testing Section. Any remaining physical testing following the divestment of General Tire would be supervised or performed on an *ad hoc* basis by the professional Research Scientists and Research Physicists who remain in the Section, as well as by the Section Head, Donald R. Wiff.

As can be seen from the reasons for each decision, the Research Division management made a careful job-by-job analysis of each position, eliminating only those which were no longer necessary to a smaller GenCorp following the takeover attempt. In no case did GenCorp make cuts based on age or seniority; rather, each decision was made according to GenCorp's expected future research needs and management's assessment of how the incumbent employees fitted those needs. Indeed, in some instances (*e.g.*, Barnes) the older employee was retained. In other instances the age differences were small. (For example, the research machinist who was retained was less than two years younger than Petitioner Gibson and

had virtually the same seniority.) In other cases (*e.g.*, Muth and Spagnuolo) the Petitioner was the only person to hold a particular job classification, which was eliminated.

Diversitech General, Inc. Each of GenCorp's remaining subsidiaries was also required to adjust to the corporate downsizing. At DiversiTech, management implemented numerous cost-cutting measures, including a hiring freeze, suspension of all training seminars, a 25% reduction in travel expenses, a 50% reduction in overtime, and the termination of all temporary help. Despite these measures, management was still required to reduce the salaried payroll.

To accomplish this, management identified those positions which could be eliminated with the least disruption to the organization. In some cases, job functions were split and consolidated with other positions; in other cases, job functions were simply abolished.

At the time of the restructuring, Petitioner Richard S. Novitsky [DOB: 10-4-30] served as Manager of Ecology & Government Compliance. He had no subordinates assigned to him and he reported directly to the Latex Manufacturing Manager at the Mogadore, Ohio plant, H.E. Jewett. Mr. Jewett [DOB: 7-14-34], like Mr. Novitsky, has a background in environmental work.

The position of Manager for Ecology & Government Compliance was eliminated, since many of its environmental compliance functions were redundant of functions performed, or partially performed, in other positions. As a result, the residual duties of Manager for Ecology & Government Compliance were split-up and consolidated with four other existing positions:

Latex Manufacturing Manager—H.E. Jewett

Personnel Administration, OSHA/EEO—L.E. Gulka

Safety Inspector—T.C. Stokes

Senior Process Engineer—R.A. Newgent

Significantly, most of the duties were assumed by Messrs. Stokes, then age 57 [DOB: 11-5-29], and Newgent, then age 51 [DOB: 10-23-35]. Mr. Stokes is actually *older* than Mr. Novitsky, and Mr. Newgent is also a contemporary of Mr. Novitsky.

SUMMARY OF ARGUMENT

This Court has properly cautioned that statistics in employment discrimination cases must be utilized carefully in order to avoid penalizing employers for mere statistical patterns which are unconnected to any discriminatory acts. This is especially true in individual, disparate treatment cases such as the present one.

The Sixth Circuit made a careful, case-by-case analysis of the evidence and rendered a decision based on the specific facts before it. The Circuit court specifically rejected the broad, blunderbuss principle Petitioners espouse. To adopt Petitioners' proposed rule would inevitably force employers to conduct layoffs by strict age quotas.

The Sixth Circuit merely held that, on the specific facts of the eleven ADEA cases presented, the Petitioners' statistics did not, by themselves, create an issue of fact as to whether Respondents' reasons for its actions were pretextual. Petitioners' claim of a conflict among the Circuits is therefore false. The present cases, like those of the other Circuits, are each highly fact-specific and do not contradict each other on the applicable legal principles.

REASONS FOR DENYING THE WRIT

A. Certiorari Is Inappropriate Since The Sixth Circuit's Decision Is In Full Accord With The Teachings Of This Court.

This Court has consistently taken a balanced and reasonable approach to the use of statistics in employment discrimination cases. While the right statistics in the proper context can certainly be probative of discrimination, their probity must be examined on a case-by-case basis. Thus, for example, this Court has refused to credit statistics allegedly showing discrimination in hiring where the employer's work force is compared to the general population rather than to the relevant labor market. *Wards Cove Packing Co., Inc. v. Atonio*, _____ U.S. _____, 109 S. Ct. 2115 (1989).

Characteristically, Petitioners ignore the teaching of *Wards Cove*, just as they ignore this Court's seminal discussion of employment discrimination statistics in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). (Astonishingly, neither of these landmark decisions are even cited in the Petition for Writ of Certiorari.) In *Teamsters* the Court upheld the use of statistical evidence in discrimination cases, but warned:

> [S]tatistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances.

Id., 431 U.S. at 340. Statistics are not magic talismans inevitably pointing toward discrimination; rather, as in *Wards Cove*, they often serve merely to disguise a partisan conclusion with an unwarranted scientific aura.

The reason for viewing statistics cautiously was forcefully stated in *Wards Cove*. The discrimination statutes, including the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 *et seq.*, prohibit discrimination against individuals on the basis of certain characteristics. They do not prohibit particular statistical patterns, nor do they require employers to perfectly match every personnel action (such as the reduction-in-force in the present case) to any particular demographic ideal. Otherwise,

> [t]he only practicable option for many employers would be to adopt ... quotas, insuring that no portion of his work force deviates ... from the other portions thereof; this is a result that Congress expressly rejected in drafting Title VII.

Wards Cove, _____ U.S. at _____, 109 S. Ct. at 2122. The rule Petitioners' espouse would inevitably lead to age quotas, since even when the plaintiff is *younger* than the retained employee (as in the case of Petitioners Barnes and Novitsky), Petitioners claim statistics alone would support a jury verdict in their favor.

The Sixth Circuit properly rejected such a ludicrous proposition, and applied the principle stated in *Teamsters*. First, the Sixth Circuit held that the statistical evidence presented by the Petitioners did establish a prima facie case, *i.e.*, a set of facts which, *if unexplained*, would permit an inference of discrimination. *Barnes v. GenCorp, Inc.*, 896 F.2d 1457, 1466 (6th Cir. 1990), Petition for Writ of Certiorari at A16-A17. In *Teamsters*, this Court envisioned that statistics may perform precisely such a role. *Id.*, 431 U.S. at 339 n.20 (statistics may be probative of discrimination because *absent explanation* it is to be expected that over time a nondiscriminatory hiring policy will result in a workforce more or less representative of the racial makeup of the relevant labor market).

The Sixth Circuit then proceeded to the next analytical step in an employment discrimination case, and examined whether Respondents had a legitimate, nondiscriminatory reason for their action. *See, McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973). The Sixth Circuit found that Respondents provided specific, detailed, legitimate, non-discriminatory reasons for selecting each of the Petitioners for layoff. *Barnes*, 896 F.2d at 1468, Petition for Writ of Certiorari at A22. [These reasons are summarized *supra* at pages 2-8.] Under the principles of *McDonnell Douglas*, the Petitioners' prima facie case was therefore rebutted and Respondents were entitled to summary judgment unless there was a genuine issue of material fact as to whether Respondents' stated reasons for the layoff decisions were mere pretexts for age discrimination.

Petitioners could have attempted to establish pretext either directly, by showing that the discriminatory reason was the true reason motivating the employer's conduct, or, indirectly, by showing that the employer's stated reason for its conduct is false. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981). But instead of addressing the specific set of facts resulting in each Petitioner's layoff, Petitioners merely reiterated the same Division-wide statistics on which they relied for their prima facie case. The Sixth Circuit properly rejected this approach, and its decision is in perfect accord with the decisions of this Court.

B. Certiorari Is Inappropriate Since The Sixth Circuit's Decision Is Consistent With The Decisions Of The Other Circuits.

Significantly, the Sixth Circuit did *not* hold that statistical evidence can never establish pretext. Rather, it limited its analysis only to the facts of the present

case: "We are unwilling to hold that statistics could never form the basis for a rebuttal, but we do not believe that the statistics presented *in this case* provide an adequate response to the defendants' explanations." *Barnes*, 896 F.2d at 1468, Petition for Writ of Certiorari at A23 (footnote omitted; emphasis added).[2] Therefore, the Sixth Circuit's decision is in perfect accord with all of the cases Petitioners cite in their attempt to show a conflict among the Circuits. *See* cases cited in Petition for Writ of Certiorari at 14-15. Every case cited by Petitioners employs the same case-by-case analysis of statistics which this Court prescribed in *Teamsters* and which the Sixth Circuit employed in *Barnes*. For example, in *Freeman v. Package Machinery Co.*, 865 F.2d 1331 (1st Cir. 1988), the court did not adopt the *per se* rule that Petitioners espouse, that any particular statistical evidence is always competent to rebut a legitimate nondiscriminatory reason. Rather, the court stated plainly that "[t]he probative worth of statistical testimony must be evaluated in light of the methodology employed, the data available, and the factual mosaic unique to the case at hand." 865 F.2d at 1342 n.5.[3]

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[2] In this regard the Sixth Circuit is also in perfect accord with the Equal Employment Opportunity Commission, which filed an *amicus* brief below. In that Brief the EEOC noted that its support for the statistical argument in the present case applied only to the prima facie stage of analysis, since "the issues concerning pretext are largely factual in nature." Brief for the Equal Employment Opportunity Commission as *Amicus Curiae* at p. 10, n.7.

[3] Interestingly, Petitioners did not cite *Freeman* or any of the other cases allegedly in conflict with the Sixth Circuit in either their principal brief, reply brief or petition for rehearing when the present case was still before the Sixth Circuit.

The Sixth Circuit properly rejected the particular statistical evidence Petitioners proffered to show pretext because there is no showing of any specific causal relationship between the statistics and the individual decisions GenCorp and DiversiTech made with respect to each Petitioner. As the Sixth Circuit properly reasoned:

> By presenting evidence that each plaintiff was less qualified than others occupying comparable positions, the defendants have undercut the importance of the plaintiffs' statistical proof. This method of attacking a statistical prima facie case cannot be rebutted by reference to the statistics already presented since the statistics here do not tend to establish that age played a factor in any *particular* decision.

Barnes, 896 F.2d at 1469, Petition for Writ of Certiorari at A25 (footnote omitted; emphasis in original.) Petitioners' statistics merely asserted that, for example, GenCorp could have been expected to lay off 15 employees over the age of 48, and since 24 were actually laid off, discrimination may have been afoot. But the statistics said nothing about whether Petitioner Barnes, for instance, was included in the layoff for a legitimate reason or a discriminatory one. Yet the very purpose of the *Burdine* order of proof is to so narrow the issues as to require the plaintiff to focus on the *particular* facts of each case.

> If the defendant carries this burden of production [of a non-discriminatory reason], *the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity*. Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to *frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext*.

Burdine, supra, 450 U.S. at 255-56 (emphasis added).

In the present case, Respondents have given detailed reasons for each decision they made. The individuals in each job function were evaluated and the persons deemed best suited for the new direction GenCorp was taking were retained. Petitioners, however, want to ignore these individual decisions and instead focus on lifeless, broad-brush statistics. Petitioners' statistics in effect provide a satellite-high overview of the Research Division and DiversiTech. To rebut the Petitioners' prima facie case, Respondents focused the camera in on each individual Petitioner, thus narrowing the inquiry to the "new level of specificity" required by *Burdine*. Not flattered by the picture thus revealed, Petitioners seek to avoid narrowing the issue, as *Burdine* mandates. The Sixth Circuit properly rejected Petitioners' argument as the self-serving effort it so clearly is.

Other Circuits besides the Sixth have followed *Burdine* in looking to the specific reasons as employer offers to rebut a statistical prima facie case. For example, in *Moore v. McGraw Edison Co.*, 804 F.2d 1026 (8th Cir. 1986), the court agreed that statistics showing a two in 1,000 probability that a discharge during a reduction-in-force was age neutral created a prima facie case. However, the court held that prima facie case was rebutted by the employer's specific reasons for selecting a specific plaintiff for layoff:

> Statistical evidence, while relevant to show motive, intent or purpose, is not determinative of an employer's reasons for the action taken against an individual grievant. [Citations omitted.] Especially in the context of age discrimination cases, in which there are factors tending to negate the probative value of such evidence, statistics might not be reliable to indicate an employer's compliance with the Act's proscriptions. . . . Even if there were

> reason to believe that the expert's opinion had been enough to establish a prima facie case of discrimination based on age, E-M presented reasonable factors other than age for the terminations to rebut this testimony.

804 F.2d at 1031.[4] Similarly, in *Stephen v. PGA Sheraton Resort, Ltd.*, 873 F.2d 276 (11th Cir. 1989), the plaintiff was held to have established a prima facie case of racial discrimination through statistics. However, judgment for the employer was affirmed because the employer's reason for discharging the individual plaintiff—inadequate language skills—was not logically rebutted by the statistics.

Exactly the same situation obtains in the present case. Petitioners' statistics, at best, only show that a statistically high number of older employees were included in the reduction-in-force. Neither the statistics nor any other evidence establishes that these particular Petitioners were discriminated against. The purpose of the *Burdine* process is to move the inquiry precisely to that step.

The unrebutted reasons for the individual decisions, are described in the statement of the case, p. 1 et seq., *supra*. Petitioners did not offer one scrap of evidence to suggest these reasons were pretextual. Rather, they were content to repeat their statistical prima facie case. Because none of the Respondents' non-discriminatory reasons for selecting these Petitioners for layoff have been challenged, the Sixth Circuit was correct to affirm the District Court's granting of summary judgment.

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[4] Despite *Moore*, Petitioners claim that the Eighth Circuit is one of the courts which is in conflict with the present case. Petition for Writ of Certiorari at 14-15. Petitioners clearly have the argument backwards, since *Moore* is in full accord with the Sixth Circuit's case-by-case approach to statistics.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

THOMAS H. BARNARD
Counsel of Record
Erieview Tower—20th Floor
1301 East Ninth Street
Cleveland, Ohio 44114-1886
(216) 696-7600
Attorney for Respondents

Of Counsel:

DAVID J. SOMRAK
DUVIN, CAHN & BARNARD
Erieview Tower—20th Floor
1301 East Ninth Street
Cleveland, Ohio 44114-1886
(216) 696-7600

WILLIAM GORENC, JR.
GENCORP INC.
175 Ghent Road
Fairlawn, Ohio 44313
(216) 869-4262

(3)

No. 90-224

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IN THE

Supreme Court of the United States

October Term, 1990

JON F. BARNES, HOMER L. GIBSON,
JEAN Z. GIPSON, CLARENCE P. KENNEDY,
NORMAN J. MUTH, FEBO C. SPAGNUOLO,
Petitioners,

vs.

GENCORP INC.,
Respondent.

—0—

RICHARD S. NOVITSKY,
Petitioner,

vs.

DIVERSITECH GENERAL, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF

RICHARD V. LEVIN
Counsel of Record
66 South Miller Road
Akron, Ohio 44333
(216) 836-5297
Attorney for Petitioners

Of Counsel:
LAURIE F. STARR
DAVID E. ROLOFF
GAINES & STERN
1700 Ohio Savings Plaza
Cleveland, Ohio 44114
(216) 781-1700

BEST AVAILABLE COPY

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No. 90-224

REPLY BRIEF

Petitioners submit this brief in response to the arguments contained in the Brief in Opposition—both to demonstrate the overall weakness of the opposing position and to correct several misleading statements and citations appearing therein.

Petitioners will analyze respondents' arguments in relation to the factors which, if applicable, would typically provide the strongest reasons *against* the issuance of a writ of certiorari. Such factors include:

1. The question presented for review is unworthy of consideration by this Court.
2. The evidence in the record is unsuitable for a meaningful resolution by this Court of the question presented for review.
3. Petitioners are raising an argument not asserted in the courts below.
4. The decision below does not fairly raise the question presented for review.
5. Petitioners' cited decisions from other circuits are consistent with the decision below.
6. The decision below was mandated by decisions of this Court.

Petitioners will now proceed to analyze respondents' position with respect to each of the factors enumerated above.

1. Question Presented is Unworthy of Consideration.

Respondents do not deny the significance of the question presented for review. Instead, they repeatedly contend—in the nature of a brief on the merits—that the question was decided correctly by the circuit court and thus review by this Court is presumably unnecessary. But assuming, *arguendo,* that the decision below was indeed correct, that would mean that at least five other circuits have reached *incorrect* conclusions on the same question and—absent a definitive decision by this Court—are likely to continue doing so.

2. Evidence is Unsuitable for Resolution of Question Presented.

Respondents do not challenge the strength of petitioners' statistical evidence—and thus its suitability to serve as the basis of this Court's resolution of the question presented for review. In effect, respondents accept such evidence as constituting a stand-alone prima facie case—just as the Sixth Circuit did.

Unable to challenge petitioners' evidence, respondents instead emphasize the circumstances of their reduction-in-force which gave rise to the claims of petitioners and other discharged employees. *See* Brief in Opposition at 1. In focusing undue attention on economic factors, respondents wrongly imply that the legitimacy of such considerations is somehow an issue in these cases. In fact, petitioners have never questioned respondents' right to reduce their workforce, but only their underlying motives in determining *which* positions and employees to eliminate—motives which in many instances can be exposed only by statistical analysis.

3. Question Presented was not Raised in Lower Courts.

Respondents question petitioners' choice of citations in the circuit court (*see* Brief in Opposition at 13, n.3) but they do not—because they *cannot*—allege a failure by petitioners to timely assert the proposition that their statistical evidence was sufficient to raise a genuine issue of material fact on the issue of pretext. Petitioners' briefs in the Sixth Circuit, while emphasizing decisions of this Court and of the Sixth Circuit, explicitly asserted the sufficiency of the statistical evidence to demonstrate pretext.

Respondents' preoccupation with citations of authority is ironic in that they have yet to cite—either in the lower courts or in this Court—even one disparate-treatment case (except, of course, the decision below) in which summary judgment or a directed verdict was granted, or a plaintiff's verdict reversed, on the grounds that plaintiff's evidence was entirely statistical in nature.

4. Decision Below does not Raise Question Presented.

Respondents embrace the circuit court's disclaimer that it meant to hold that statistics can never establish pretext. *See* Brief in Opposition at 12-13. But it is clear from the panel's initial, emphatic endorsement of petitioners' statistical evidence as constituting a stand-alone prima facie case, and also from the absence of any criticism of the statistics, that if *these* statistics could not satisfy the court on the issue of pretext, no other statistical evidence would have faired any better. The decision below, therefore, squarely raises the question of whether unusually strong statistical evidence can raise a genuine issue of material fact as to pretext.

5. Decisions in Other Circuits are Consistent with Decision Below.

In a desperate attempt to negate or at least obscure the conflict between circuits, respondents misstate petitioners' position beyond recognition while also misrepresenting the import of a number of cases from other circuits. Petitioners surely do not, as respondents contend, espouse a "per se" rule "that any particular statistical evidence is always competent to rebut a legitimate nondiscriminatory reason." *See* Brief in Opposition at 13. Petitioners merely contend that statistical evidence *strong enough to constitute a stand-alone prima facie case* should also be sufficient to raise a genuine issue of material fact on the issue of pretext.

Respondents attempt to dismiss petitioners' cited cases from the First, Second, Fifth, Eighth and Tenth Circuits as being "highly fact-specific," involving "case-by-case analysis of statistics" (*see* Brief in Opposition at 9, 13)—as if that somehow would nullify the common ground on which the cases rest. In each of the cited cases, statistical evidence showing a significant pattern of discrimination was deemed sufficient to demonstrate pretext. For example, the "factual mosaic" referred to by respondents in quoting from *Freeman v. Package Machinery Company*, 865 F.2d 1331, 1342 n.5 (1st Cir. 1988), was comprised entirely of statistical evidence, which was found sufficient to support a jury verdict for the plaintiff.

To be sure, rigorous scrutiny of the statistical evidence was critical to each circuit court's determination that the statistics raised an inference of discrimination, but once that conclusion was reached, it was simply held as a matter of law that such evidence was sufficient to show pretext. Had the Sixth Circuit taken the same view of the law in the appeal below, the court's highly

favorable assessment of petitioners' statistics at the prima facie stage would have compelled an equally favorable conclusion on the issue of pretext. That is precisely the conflict between circuits which respondents seek to obscure.

Respondents also cite two cases, *Moore v. McGraw Edison Company*, 804 F.2d 1026 (8th Cir. 1986), and *Stephen v. PGA Sheraton Resort, Ltd.*, 873 F.2d 276 (11th Cir. 1989), whose inclusion in their brief is both puzzling and illuminating. *See* Brief in Opposition at 15-16. In *Moore*, from which respondents quote a long passage, the employer's successful rebuttal of statistical evidence was decided by the *jury*. Thus, plaintiff's statistical evidence presumably overcame motions for summary judgment and a directed verdict. The circuit court merely concluded that the employer "presented sufficient reasonable factors other than age so that the jury *could* conclude that age was not a factor in the termination . . ." *Moore*, 804 F.2d, at 1031 (emphasis added). Similarly, in *Stephen*, the plaintiff's disparate-treatment claim was rejected by the district court as the *trier of fact*. Moreover, only the disparate-impact claim was appealed, and it was decided by the circuit court on business-practice issues unique to disparate-impact cases.

At best, *Moore* and *Stephen* demonstrate that statistical evidence may be successfully rebutted *at trial*—a point not even remotely at issue in this appeal. More to the point, respondents' citation of these two cases exposes their inability to cite *any* disparate-treatment cases (other than the decision below) in which summary judgment or a directed verdict was granted, or a plaintiff's verdict overturned, on the grounds that plaintiff's case was based entirely on (probative) statistical evidence.

The decision below thus stands alone against the collective wisdom of five other circuits.

6. Decision Below was Mandated by Decisions of this Court.

Notwithstanding respondents' contention that the decision below is "in perfect accord with the decisions of this Court" (*see* Brief in Opposition at 10-12), respondents have in no way justified the circuit court's failure to adhere to this Court's pronouncements on the wide latitude to be given the plaintiff in demonstrating pretext, including the use of statistics. *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 804-05, 93 S.Ct. 1817, 1825-26 (1973); *Patterson v. McLean Credit Union*, _____ U.S. _____, 109 S.Ct. 2363, 2378-79, 2394 (1989). Respondents' arguments merely demonstrate that statistical evidence must be closely scrutinized by the court and, if found to be probative of discrimination, may be rebutted by other evidence at trial.

In their attempt to legitimize the decision below, respondents inaptly cite *Wards Cove Packing Company, Inc. v. Atonio*, _____ U.S. _____, 109 S.Ct. 2115 (1989). *See* Brief in Opposition at 10-11. In *Wards Cove*, the plaintiffs' case was based on statistical disparities in the racial composition of various departments of the same employer. That approach was rejected by this Court, which held that the proper comparison is between the racial composition of the at-issue jobs and of the qualified population in the relevant labor market.

The statistical approach rejected in *Wards Cove* bears no resemblance to petitioners' statistical studies, in which age-group discharge rates were analyzed only *within* particular divisions—i.e., no comparison was made of discharge rates *between* divisions. Moreover, *Wards Cove* is a hiring-and-promotion case, with

applicant-pool issues not present in discharge cases; and it is strictly a disparate-impact case, involving standards of proof not associated with disparate-treatment cases. *Wards Cove* has no applicability to either the factual or legal issues in disparate-treatment cases.

Particularly in reduction-in-force situations, it would be absurd to contend that employers must resort to quotas to avoid exceeding a three-standard-deviation disparity in discharge rates between older and younger workers (all of whom are presumably qualified in the first place). Such gross disparities in discharge rates are so overwhelmingly unlikely to occur by chance that an employer need take only one precaution: Avoid any discriminatory motive.

The conflicting perceptions expressed by the parties in regard to Supreme Court precedent should serve to demonstrate that there is great uncertainty as to how this Court would rule on the critical question presented in the instant Petition. A definitive decision by this Court would promote the consistent enforcement of the ADEA and other discrimination laws while bringing uniformity to the circuits.

CONCLUSION

Based upon the reasons set forth above and in their Petition for a Writ of Certiorari, the petitioners respectfully request that this Honorable Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

RICHARD V. LEVIN
Counsel of Record
66 South Miller Road
Akron, Ohio 44333
(216) 836-5297
Attorney for Petitioners

Of Counsel:
LAURIE F. STARR
DAVID E. ROLOFF
GAINES & STERN
1700 Ohio Savings Plaza
Cleveland, Ohio 44114
(216) 781-1700